Supreme Court, U.S.
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No._____

In the

SUPREME COURT OF THE UNITED STATES

BTA OIL PRODUCERS, ET AL.,
Petitioners,

v.

MDU RESOURCES GROUP, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH DAKOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was contrary to the Fourteenth Amendment of the Constitution for the North Dakota Supreme Court to have ruled that producers of natural gas which are neither incorporated in North Dakota nor have their principal places of business in North Dakota have no cause of action to recover millions of dollars of damages that they incurred as the result of breaches of contract by the state's principal utility?

PARTIES TO THE PROCEEDINGS

Petitioners BTA Oil Producers, Conoco Inc., Equitable Production Company, Exxon Mobil Corporation, Midgard Energy Company, Sinclair Oil Corporation, Kerr-McGee Oil & Gas Onshore L.P., TBI Exploration, Inc., Tipperary Oil & Gas Corporation, and Tom Brown, Inc. were plaintiffs and appellants in the proceedings below. MDU Resources Group, Inc. and its subsidiary Williston Basin Interstate Pipeline Company (collectively "MDU") and Koch Industries Inc. and its division Koch Hydrocarbon Company (collectively "Koch") are Respondents and were defendants and appellees in the proceedings below.

In accordance with Rule 29.6, Petitioners state the following. BTA Oil Producers is not a corporation, there is no publicly held company which owns more than 10% of Conoco Inc.'s stock, Equitable Production Company is a privately owned company, there is no publicly held company which owns more than 10% of Exxon Mobil's stock, Midgard Energy Company is a subsidiary of Repsol YPF SA, Sinclair is a privately-owned company, Kerr-McGee Corporation owns more than 10% of Kerr-McGee Oil & Gas Onshore L.P.'s stock, TBI Exploration, Inc. is a subsidiary of Tom Brown, Inc., a privately-owned company, and Tipperary Corporation owns more than 10% of the stock of Tipperary Oil & Gas Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDINGS..... ii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 1

REASONS FOR GRANTING THE WRIT..... 6

The North Dakota Supreme Court's Decision That The Petitioners Have No Cause Of Action To Recover Damages They Suffered As The Result Of MDU's Breaches Of Contract Is Invidiously Discriminatory And Violates The Fourteenth Amendment Of The Constitution..... 6

CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases **Page**

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 100 L.Ed.2d 896, 108 S.Ct. 2218 (1988)..... 11

C & A Carbone v. Town of Clarkston, 511 U.S. 383, 128 L.Ed.2d 399, 114 S.Ct. 1677 (1994)..... 11

Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 137 L.Ed.2d 852, 17 S.Ct. 1590 (1997)..... 11

Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)..... 12

Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), cert denied, 89 S.Ct. 618, 393 U.S. 1016, 21 L.Ed.2d 560..... 7

Edwardsen v. Morton, 369 F.Supp. 1359 (D.C. D.C. 1973)..... 7

Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 504 U.S. 353, 119 L.Ed.2d 139, 112 S.Ct. 2019 (1992)..... 11

Government Suppliers Consolidated Services, Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992), cert denied 506 U.S. 1053, 122 L.Ed.2d 131, 113 S.Ct. 977 (1993)..... 11

Cases **Page**

Hughes v. Oklahoma,
441 U.S. 322, 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979)..... 11

Joseph Bros. Co. v. Brown,
415 N.E.2d 987, 65 OhioApp2d 43, 19 O.O.3d 31 (1979)..... 7

Koch Hydrocarbon v. MDU Resources Group,
988 F2d 1529 (8th Cir. 1992)..... 3

Martinez v. Fox Valley Bus Lines,
17 F.Supp. 576 (D.C. Ill. 1936)..... 7

M.L.B. v. S.L.J.,
519 U.S. 102, 116 n. 8, 117 S.Ct. 555, 564 n.8, 136 L.Ed2d 473 (1996)..... 6

New York Times Co. v. Sullivan,
376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)..... 6

Pelican Chapter, Associated Builders & Contractors, Inc.,
128 F.3d 910 (5th Cir. 1997)..... 11

Philadelphia v. New Jersey,
437 U.S. 617, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978)..... 11

Shelley v. Kraemer Mich. & Mo.,
68 S.Ct. 836, 334 U.S. 1, 92 L.Ed 1161 (1947)..... 6

Cases **Page**

Albrecht v. Walter,
572 N.W.2d 809 (N.D. 1997)..... 4

Midland Diesel Service v. Gilbert Sivertson,
307 N.W.2d 555 (N.D. 1981)..... 4

MISCELLANEOUS

Nowak and Rotunda,
Constitutional Law, 6th ed. at 662 (2000)..... 11

PETITION FOR WRIT OF CERTIORARI

BTA Oil Producers, Conoco Inc., Equitable Production Company, Exxon Mobil Corporation ("Exxon Mobil"), Midgard Energy Company, Sinclair Oil Corporation, Kerr-McGee Oil & Gas Onshore L.P., TBI Exploration, Inc., Tipperary Oil & Gas Corporation, and Tom Brown, Inc. by and through counsel, respectfully petition for a writ of certiorari to review a final judgment of the North Dakota Supreme Court.

OPINIONS BELOW

The Opinion of the North Dakota Supreme Court is unreported and is attached (App. A). The underlying trial court decisions are also attached (App. B, C, and D).

JURISDICTION

The judgment of the North Dakota Supreme Court was entered on April 16, 2002. (App. B). Appellants' Petition for Rehearing was denied on May 17, 2002. (App. F). This Court has jurisdiction under 28 U.S.C. Section 1257(a).

STATEMENT OF THE CASE

The Petitioners in this case are one partnership and nine companies that are incorporated in states other than North Dakota, all of which have their principal places of business in states other than North Dakota. In contrast, MDU is the primary utility serving North Dakota. This case concerns whether it was contrary to the Fourteenth Amendment of the

Constitution of the United States for the North Dakota Supreme Court to have ruled that the Petitioners have no cause of action to recover many millions of dollars of damages that they sustained which are attributable to MDU's judicially determined breaches of contract. As a direct result of the ruling, the court is allowing MDU to retain many millions of dollars of damages that it caused through its undisputed breaches of contract.

The Petitioners are both independent and integrated oil and gas producers. They and their predecessor companies entered into approximately ninety "Gas Purchase Contracts" and "Gas Processing Agreements" with Koch, under which they delivered to Koch natural gas which they produced in Montana and North Dakota. In return, Koch committed to pay Petitioners a percentage of the proceeds from disposition of the gas or an amount otherwise based on such dispositions. The percentage varied but was typically 75%.

Koch processed Petitioners' gas at a facility in North Dakota known as the McKenzie Plant and contracted to sell the processed or "residue" gas to MDU under various long-term contracts. MDU breached its contracts with Koch by failing to purchase the contract volumes and by failing to pay the contract price, and Koch accordingly sued MDU for approximately $400 million. MDU "essentially conceded" that it had breached the contracts on oral argument, but it defended in part by asserting that the gas producers rather than Koch bore approximately 75% of the resulting economic losses and were therefore the "real parties in interest." The trial court determined that MDU had breached the contracts, but it accepted MDU's argument concerning "real parties in interest" and reduced Koch's claimed damages by 75%.

Both MDU's liability for breach of contract and the 75% reduction were affirmed by the U.S. Court of Appeals for the Eighth Circuit. Koch Hydrocarbon Co. v. MDU Resources Group, Inc., 988 F.2d 1529 (8th Cir. 1992) (Koch v. MDU).

At approximately the time that Koch had sued MDU, Koch represented in writing to the Petitioners that it had settled its claims against MDU for prior periods and would pay Petitioners their share, but that it had been required to file suit for later years, and that it would keep the Petitioners apprised of "major developments" in the litigation. However, Koch failed to apprise the Petitioners of the 75% reduction of damages attributable to Petitioners' interests, notwithstanding the written commitments it had made. (App. I-7—I-8).

After the Petitioners subsequently learned of the damages reduction, they filed the present case in state court in North Dakota, seeking in part to recover their share of damages attributable to MDU's breaches of contract under unjust enrichment and implied trust. (App. I).

During the pendency of this case, the North Dakota Supreme Court decided Apache Corp. v. MDU Resources Group Inc., 603 N.W.2d 891 (N.D. 1999) ("Apache") (App. E). In Apache, two unrelated gas producers which were somewhat similarly situated had separately sued MDU in unjust enrichment and implied trust. The trial court denied the two producers' claims after a bench trial. The North Dakota Supreme Court affirmed, specifically determining that:

> Although MDU saved money by breaching its contract with Koch, and Apache received less money from Koch when MDU breached its

> contract with Koch, MDU contracted with Koch and not with Apache. The money MDU saved by breaching its contract with Koch was not a 'benefit at the direct expense of' Apache. Sivertson, 307 N.W.2d at 557. Apache's reduced income resulted from its use of a percentage of proceeds as a factor in its agreements with Koch, which contemplated increases or decreases in gas prices. Where the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity. Albrecht, 1997 ND 238, Para. 23, 572 N.W.2d 809. (emphasis added).

The trial court in this case subsequently granted summary judgment against the Petitioners based on Apache. (App. D). After judgment was entered, the Petitioners asserted to the North Dakota Supreme Court on appeal that Apache had been wrongly decided, and they proferred additional argument distinguishing Apache. (App. H). But the North Dakota Supreme Court declined to reconsider its Apache decision, and it affirmed the trial court's grant of summary judgment against the Petitioners. (App. A).

Petitioners had also argued in their Complaint that if Koch had informed them of the 75% reduction in damages in Koch v. MDU, as Koch had expressly committed to do, they would have intervened and would have taken actions to claim their damages or otherwise to mitigate their losses. The North Dakota Supreme Court rejected that position as well, stating:

> BTA's entire argument is premised upon its belief it could have recovered damages from MDU had it learned earlier of the federal court's ruling. In Apache and this case, however, we

have held that producers had no valid claim for damages against MDU.
(App. A-11) (emphasis added.)

Thus, under Apache and the North Dakota Supreme Court's decision here, gas producers such as Petitioners cannot recover against MDU, and under Koch v. MDU, neither can Koch. Therefore, the cumulative effect of the three decisions is that MDU is permitted to breach its North Dakota gas contracts with impunity, and because the gas producers have percentage-of-proceeds and similar contracts with Koch, MDU is required only to disgorge 25% of the damages that it caused. Thus, MDU is allowed to retain 75% of its ill-gotten gains, representing many millions of dollars. As a corollary, because MDU is the principal utility serving North Dakota, it will not incur the cost of disgorging most of the damages it caused, so MDU will not be claiming payment of those amounts as a basis for increasing the rates it charges North Dakotans, and their energy costs are artificially decreased. And in sharp contrast, the gas producers, such as Petitioners, which are neither incorporated in nor have their principal places of business in North Dakota, and which MDU represented in Koch v. MDU had borne the losses resulting from the breaches, are being required to absorb many millions of dollars of economic losses.

The Petitioners asserted in their Petition for Rehearing that this violated the due process requirements contained in the Fourteenth Amendment to the Constitution of the United States. (App. G-2). The North Dakota Supreme Court denied the Petition in a summary fashion without specifically addressing this contention. (App. F).

REASONS FOR GRANTING THE WRIT

THE NORTH DAKOTA SUPREME COURT'S DECISION THAT THE PETITIONERS HAVE NO CAUSE OF ACTION TO RECOVER DAMAGES THEY SUFFERED AS THE RESULT OF MDU'S BREACHES OF CONTRACT IS INVIDIOUSLY DISCRIMINATORY AND VIOLATES THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

A writ of certiorari should be granted, because the North Dakota Supreme Court's ruling that the Petitioners have no cause of action to recover damages resulting from MDU's judicially determined breaches of contract is invidiously discriminatory, and it violates the substantive due process requirements of the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment provides in relevant part that, "...nor shall any State deprive any person of life, liberty, or property, without due process of law." It is well established that actions taken by state courts and judicial officers in their official capacities must comply with this requirement. ("That the action of state courts and judicial officers in their official capacities is to be regarded as the action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.") Shelley v. Kraemer Mich. & Mo., 68 S.Ct. 836, 334 U.S. 1, 92 L.Ed 1161 (1947); M.L.B. v. S.L.J., 519 U.S. 102, 116 n. 8, 117 S.Ct. 555, 564 n. 8, 136 L.Ed.2d 473 (1996). State judicial action is not immunized from the application of due process requirements, even if it is taken pursuant to a state's common law. New York Times Co. v. Sullivan , 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686

(1964); Edwards v. Habib, 397 F.2d 687 (D.C.Cir. 1968), cert denied, 89 S.Ct. 618, 393 U.S. 1016, 21 L.Ed.2d 560

For purposes of due process, "property" includes both causes of action and contract rights. Edwardsen v. Morton, 369 F.Supp. 1359 (D.C.D.C. 1973); Martinez v. Fox Valley Bus Lines, 17 F.Supp. 576 (D.C.Ill. 1936); Joseph Bros. Co. v. Brown, 415 N.E.2d 987, 65 OhioApp2d 43, 19 O.O.3d 31 (1979). The North Dakota Supreme Court violated the substantive due process requirements of the Fourteenth Amendment by denying Petitioners their causes of action and contract rights without a rational basis and in an invidiously discriminatory manner.

Petitioners' ninety "Gas Sales Contracts" and "Gas Processing Agreements" are executed and enforceable, which is demonstrated by the North Dakota Supreme Court's affirmation of another part of the judgment in this case awarding Exxon Mobil damages against Koch for improperly calculating treating fees under one of the contracts. (App. A-21—A-27). MDU asserted in Koch v. MDU that the gas producers had borne the resulting losses, and the North Dakota Supreme Court expressly found in Apache that "Apache received less money from Koch when MDU breached its contract with Koch." (App. E-7). This is because MDU paid Koch less for the gas, and the Petitioners' 75 percentage-of-proceeds share decreased accordingly.

The Petitioners did not have express contracts with MDU entitling them to recover this amount from MDU, so they sued MDU in unjust enrichment and implied trust. As the North Dakota Supreme Court stated in Apache, in North Dakota there have

historically and consistently been five elements necessary to prove unjust enrichment: 1. An enrichment; 2. An impoverishment; 3. A connection between the enrichment and the impoverishment; 4. Absence of a justification for the enrichment and impoverishment; and 5. An absence of a remedy provided by law. (App E-6).

The Petitioners have satisfied each of these five elements. In particular, with respect to element 3, there is undeniably a "connection" between MDU's enrichment and Petitioners' impoverishment, because if MDU were not "enriched" by being able to retain damages attributable to its breaches of contract, those damages would have been paid either directly or indirectly to the Petitioners through Koch under the percentage-of-proceeds and similar contracts. Thus, MDU's enrichment is not only "connected" to Petitioners' impoverishment, but it is a "but/for" cause of the impoverishment.

In Apache, the North Dakota Supreme Court significantly did not expressly decide that the five element test had not been satisfied, nor did it articulate why. Instead, the North Dakota Supreme Court dramatically diverged from the language of five element test in order to deny the gas producers their causes of action and contract rights. First, the court cited language from Midland Diesel Svc. & Engine Co. v. Sivertson, 307 N.W.2d 555 (N.D. 1981), for the proposition that the enrichment and the impoverishment must not only be "connected," but that the enrichment must also be a "benefit at the direct expense" of the impoverishment. (App. E-6). The North Dakota Supreme Court admittedly had included the "direct benefit" language in its Sivertson decision, even though it is not part of the five element test.

However, the court went on in Sivertson to affirm plaintiff's award in unjust enrichment, even though there was no "direct benefit" between the claimed enrichment and impoverishment, because the plaintiff "has participated somehow in the transaction through which the benefit is obtained." Thus, the "direct benefit" language in Sivertson was also plainly dicta. Moreover, here, the Petitioners showed that the requirement that there additionally be a "direct benefit" is contrary to well-established restitutionary principles, which establish that the focus of restitution is to require disgorgement of ill-gotten gains. (App. H, Part 2). The Petitioners also showed in the alternative that they satisfied the "participation" exception in Sivertson. (App. H, Part 2C). The North Dakota Supreme Court failed to address any of these showings in ruling that the Petitioners did not have a cause of action against MDU.

Second, the North Dakota Supreme Court relied on Albrecht v. Walter, 572 N.W.2d 809 (N.D. 1997) for the proposition that "[w]here the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity," and it determined that the gas producers' lost income resulted from their percentage-of-proceeds contracts with Koch, which contemplated increases or decreases in gas prices. (App. E-7).

There are two fatal flaws in this analysis. First, Albrecht actually stands for the opposite proposition, because there the plaintiffs had obtained a guarantee executed by the defendant imposing liability (i.e., a written "contractual arrangement"), but notwithstanding the "contractual arrangement" which otherwise governed, the North Dakota Supreme Court required the plaintiffs to recover in equity. Here, the

North Dakota Supreme Court's ruling is exactly the opposite - that the Petitioners cannot recover in equity because of their written arrangements (i.e., terms of their contracts with Koch.)

Second, contrary to the North Dakota Supreme Court's determination, the existence of percentage-of-proceeds contracts does not negate the relationship between contract breaches and resulting economic loss. As stated above, MDU's enrichment is a "but/for" cause of Petitioners' impoverishment, so it is at least "connected." Beyond that, in this very case the North Dakota Supreme Court affirmed Exxon Mobil's recovery of economic losses it sustained under one of the percentage-of-proceeds contracts. The court significantly did not find there that Exxon Mobil's losses resulted from the terms of the percentage-of-proceeds contract rather than from Koch's contract breaches. Similarly, here if MDU had complied with its Koch contracts, Koch should have properly paid Petitioners under their percentage-of-proceeds contracts, and the Petitioners would not have an unjust enrichment claim against MDU. Accordingly, the North Dakota Supreme Court's determination that Petitioners' economic losses were caused by their percentage-of-proceeds contracts and are, therefore, not "connected" to MDU's enrichment has no merit.

Therefore, Petitioners satisfied North Dakota's five element test for unjust enrichment in addition to well-established principles of restitution. Consequently, the North Dakota Supreme Court's determination to the contrary is not required by or consistent with the proper application of existing precedent and is erroneous.

It is important to stress, however, that this is not simply a case in which Petitioners disagree with a state court's decision. And it is not strictly speaking controlling, because as shown above, state judicial action taken pursuant to state common law is not immunized from due process requirements. Here, the North Dakota Supreme Court is purportedly applying equitable principles in an unjust enrichment action. Yet it has ruled that the primary utility in the state should be allowed to retain many millions of dollars of damages attributable to its judicially determined breaches of contract at the expense of gas producers which are neither incorporated in North Dakota nor have their principal place of business there. A law can violate due process even if it does not expressly classify persons in a discriminatory manner if it impermissibly imposes different burdens on different classes of persons. The courts should look at a law's practical effect in evaluating whether it is discriminatory, and a discriminatory effect is improper. Government Suppliers Consolidated Services, Inc. v. Bayh , 975 F.2d 1267 (7th Cir. 1992), cert denied 506 U.S. 1053, 122 L.Ed.2d 131, 113 S.Ct. 977 (1993); Pelican Chapter, Associated Builders & Contractors, Inc. , 128 F.3d 910 (5th Cir. 1997); Nowak and Rotunda, Constitutional Law 6th ed. 2000 at 662.

This Court has repeatedly struck down as unconstitutional disparities in treatment of in-state and out-of-state interests. Philadelphia v. New Jersey, 437 U.S. 617, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978), Hughes v. Oklahoma, 441 U.S. 322, 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979); Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 100 L.Ed.2d 896, 108 S.Ct. 2218 (1988); C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 128 L.Ed.2d 399, 114 S.Ct. 1677 (1994); Fort Gratiot Sanitary Landfill v. Michigan

Dep't of Natural Resources , 504 U.S. 353, 119 L.Ed.2d 139, 112 S.Ct. 2019 (1992); Camps Newfound/Owatonna v. Town of Harrison , 520 U.S. 564, 137 L.Ed.2d 852, 17 S.Ct. 1590 (1997).

This is a clear case of state action discriminating between the North Dakota state utility and gas producers from out-of-state. Petitioners' causes of action and contract rights constitute "property" for purposes of due process, and through the North Dakota Supreme Court's decision, Petitioners are being deprived of their property without due process of law.

Here, the North Dakota Supreme Court's ruling is not only discriminatory, but it is also invidious, arbitrary, and capricious, so it is contrary to due process. Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). The primary purpose of restitution is to require a wrongdoer to disgorge its ill-gotten gains, not to focus on plaintiff's losses. (App. H, Part 2A). Thus, the decision in this case is also contrary to well-established restitutionary principles. Consequently, the North Dakota Supreme Court's decision can only be understood, as a practical matter, as state protectionism, which this Court has consistently rejected under the authorities cited above.

Why should MDU, which has been judicially determined to have breached its contracts, be allowed to retain many millions of dollars of damages that it caused at the expense of out-of-state gas producers which bore the losses? There is simply no valid reason why this inequitable result should be reached in a restitutionary action based on unjust enrichment. Therefore, the Petitioners respectfully submit that it was a violation of the Fourteenth Amendment of the Constitution for the North Dakota Supreme Court to

rule that the Petitioners have no cause of action against MDU, and to thereby enable the state utility to retain many millions of dollars of breach of contract damages which it caused at Petitioners' expense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX
Table of Contents

Item	Page
BTA, et al. v. MDU, et al No. 20010122 Decision on Merits (N.D. Supreme, April 16, 2002)	A-1
BTA, et al. v. MDU, et al Civil Action No. 97C-089 Judgment (N.D. Dist., March 5, 2001)	B-1
BTA, et al. v. MDU, et al Civil Action No. 97C-089 Order for Judgment (N.D. Dist., October 4, 2000)	C-1
BTA, et al. v. MDU, et al Civil Action No. 97C-089 Memorandum (N.D. Dist., July 3, 2000)	D-1
Apache Corporation v. MDU Resources Group No. 990143 603 N.W.2d 891 (N.D. 1999)	E-1
BTA, et al. v. MDU, et al No. 20010122 Order on Petition for Rehearing (N.D. Supreme, May 17, 2002)	F-1

Item **Page**

BTA, et al. v. MDU, et al..... G-1
No. 20010122
Petition for Rehearing
(N.D. Supreme, December 12, 2001)

BTA, et al. v. MDU, et al..... H-1
No. 20010122
Appellants' Brief
(N.D. Supreme, December 12, 2001)

BTA, et al. v. MDU, et al..... I-1
Civil No. 97C-089
Second Amended Complaint
(N.D. Dist., April 17, 2000)

CERTIFICATE OF SERVICE

We, the undersigned, do hereby attest that on the 16th day of August, 2002, three true and correct copies of the above Writ of Certiorari were sent by U.S. mail to each of the parties listed below:

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 55

BTA Oil Producers, Cenex Harvest States Cooperatives, Conoco, Inc., Equitable Resources Energy Company, Exxon Mobil Corporation, Midgard Energy Company, (formerly known as Maxus Exploration Company), Sinclair Oil Corporation, Kerr-McGee Oil & Gas Onshore, L.P., TBI Exploration, Inc., (formerly known as Presidio Exploration, Inc.), Tipperary Oil & Gas Corporation, and Tom Brown, Inc.,

Plaintiffs and Appellants

v.

MDU Resources Group, Inc., (formerly known as Montana-Dakota Utilities Company), Williston Basin Interstate Pipeline Company, Inc., Koch Industries, Inc., and Koch Hydrocarbons Company,

Defendants and Appellees

No. 20010122

Appeal from the District Court of Stark County, Southwest Judicial District, the Honorable Allan L. Schmalenberger, Judge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Opinion of the Court by Sandstrom, Justice.

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BTA OIL V. MDU Resources

No. 20010122

Sandstrom, Justice.

BTA Oil Producers, Cenex Harvest States Cooperatives, Conoco, Inc., Equitable Resources Energy Company, Exxon Mobil Corporation, Midgard Energy Company, Sinclair Oil Corporation, Kerr-McGee Oil & Gas Onshore, L.P., TBI Exploration, Inc., Tipperary Oil & Gas Corporation, and Tom Brown, Inc. (collectively "BTA") appeal from a judgment that dismissed most of their claims against MDU Resources Group, Inc., and Williston Basin Interstate Pipeline Company, Inc. (collectively "MDU"), and Koch Industries, Inc., and Koch Hydrocarbons Company (collectively "Koch"), and that awarded Exxon $404,122.34 from Koch for breach of contract for miscalculating treating fees. We affirm in part, reverse in part, and remand, concluding: (1) MDU was not barred by judicial estoppel from disputing BTA's claims; (2) the district court did not err in granting summary judgment dismissing BTA's unjust enrichment and implied trust claims against MDU; (3) the district court did not err in dismissing BTA's breach of contract and unjust enrichment claims against Koch; (4) BTA failed to present competent admissible evidence establishing a genuine issue of material fact on its claim against Koch for an accounting for liquid hydrocarbons; (5) the district court applied the appropriate statute of limitations to Exxon's treating fees claim; and (6) the district court erred in determining Exxon first asserted its treating fees claim when it moved to amend the complaint on September 3, 1997.

I

During the time relevant to this case, Koch bought and processed natural gas at its processing plant in McKenzie County. BTA and the other appellants produced natural gas and sold it to Koch. The contracts between Koch and BTA were percentage-of-proceeds contracts, which did not

establish a set price for the gas purchased. Under these contracts, Koch took title to the raw natural gas, processed it, and paid BTA a percentage of the price Koch received when it resold the gas. Although the contracts between Koch and the various producers differed slightly, on average the producers received seventy-five percent of the resale price of the gas when sold by Koch.

MDU operates a natural gas distribution system. In 1979, when natural gas was in short supply, MDU and Koch entered into a ten-year contract, with MDU agreeing to purchase certain minimum volumes of gas at the highest price permitted by the Natural Gas Policy Act of 1978. MDU originally bought all of the gas available from Koch. In 1983 a surplus of gas developed, and natural gas prices fell. MDU reduced the volume of its gas purchases, taking less than Koch had available.

MDU continued paying the maximum price allowed under the Natural Gas Policy Act through 1984. On January 1, 1985, prices for natural gas were deregulated and a dispute arose over the price of gas under the contract. MDU contended the lower, unregulated market price should apply. Koch argued the last regulated price, which was higher than market price, should be applied.

In 1986, Koch acquired the rights of another seller, Phillips Petroleum Company, which had a similar gas purchase contract with MDU running through 2000. Similar disputes over gas pricing arose under that contract.

In January 1987, Koch sued MDU in federal district court for breach of contract. On May 6, 1987, MDU advised Koch it would no longer take gas under the contracts. The federal district court held MDU had breached the contract, but Koch was only entitled to recover damages based upon its twenty-five percent share of the proceeds of its sales to MDU. Koch was not allowed to recover damages based upon the seventy-five percent of the sale proceeds that went to BTA and other producers. The United States Court of Appeals for

the Eighth Circuit affirmed the percentage-of-proceeds reduction in damages, and remanded to the district court on other issues. *See Koch Hydrocarbon Co. v. MDU Resources Group, Inc.*, 988 F.2d 1529 (8th Cir. 1993). Koch and MDU subsequently settled all of their claims.

Shortly thereafter, two of Koch's producers sued MDU in state court. These producers claimed they were third-party beneficiaries of the MDU-Koch contracts, MDU had been unjustly enriched by being allowed to retain profits after defaulting on its contracts, and MDU held the remaining seventy-five percent of the alleged "damages" in a implied trust. The district court concluded the producers were not third-party beneficiaries under the MDU-Koch contracts, MDU was not unjustly enriched, and there was no evidence establishing an implied trust. We affirmed the district court judgment. *Apache Corp. v. MDU Resources Group, Inc.*, 1999 ND 247, 603 N.W.2d 891.

In March 1997, while the *Apache* case was still pending in district court, BTA brought this action against MDU and Koch. BTA alleged unjust enrichment and implied trust claims against MDU, and alleged breach of contract, unjust enrichment, fraud, and civil conspiracy claims against Koch. In July 1997, Exxon was permitted to intervene in this action as a plaintiff. Exxon pleaded an additional breach of contract claim, alleging Koch had underpaid Exxon for its gas by miscalculating "treating fees" under the contract.

MDU and Koch moved for partial summary judgment. Relying upon Apache, the district court dismissed all claims except Exxon's treating fees claim against Koch. After further discovery, Exxon and Koch both moved for summary judgment on the treating fees claim. The district court concluded Koch had breached its contract with Exxon by miscalculating treating fees and found damages of $404,122.34. Judgment was entered dismissing all claims except the treating fees claim and awarding damages to Exxon on its treating fees claim. BTA appealed.

The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. The appeal was timely underN.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 28-27-01.

II

Summary judgment is a procedural device for promptly and expeditiously disposing of an action without a trial if either party is entitled to judgment as a matter of law and if no dispute exists as to either the material facts or the reasonable inferences to be drawn from undisputed facts or if resolving the factual disputes will not alter the result. *E.g.*, *Anderson v. Meyer Broadcasting Co.*, 2001 ND 125, ¶ 14, 630 N.W.2d 46; *Van Valkenburg v. Paracelsus Healthcare Corp.*, 2000 ND 38, ¶ 17, 606 N.W.2d 908. On appeal, we review the evidence in the light most favorable to the party opposing the motion for summary judgment, and we give that party the benefit of all favorable inferences that reasonably can be drawn from the evidence. *Jaskoviak v. Gruver*, 2002 ND 1, ¶ 11, 638 N.W.2d 1.

We outlined the duty of a party opposing a summary judgment motion in *Anderson*, 2001 ND 125, ¶ 14, 630 N.W.2d 46 (quoting *Peterson v. Zerr*, 477 N.W.2d 230, 234 (N.D. 1991) (internal citations omitted)):

> "Although the party seeking summary judgment has the burden of showing that there is no genuine issue of material fact, the party resisting the motion may not simply rely upon the pleadings. Nor may the opposing party rely upon unsupported, conclusory allegations. The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.

> "In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief."

BTA argues the defenses raised by MDU in this case are inconsistent with the position MDU took in *Koch Hydrocarbon Co. v. MDU Resources Group, Inc.*, 988 F.2d 1529 (8th Cir. 1993), and MDU is therefore barred from challenging the unjust enrichment and implied trust claims under the doctrine of judicial estoppel.

We have never adopted the doctrine of judicial estoppel in this state. Judicial estoppel prohibits a party from assuming inconsistent or contradictory positions during the course of litigation. *See State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999); 28 Am. Jur. 2d *Estoppel and Waiver* § 74 (2000); 31 C.J.S. *Estoppel and Waiver* § 139(a) (1996). The underlying rationale for the doctrine is summarized in 28 Am. Jur. 2d Estoppel and Waiver § 74 (footnotes omitted):

> The fundamental concept of judicial estoppel is that a party in a judicial proceeding is barred from denying or contradicting sworn statements made therein. Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent, conflicts with, or is contrary to one that she has previously asserted in the same or in a previous proceeding; it is designed to prevent litigants and their counsel from playing fast and loose with the courts, and to protect the integrity of the judicial process. Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic

> litigants who seek to prevail, twice, on opposite theories. The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant.

The doctrine applies only where a party's subsequent position is totally inconsistent with its original position, and does not apply where distinct or different issues or facts are involved. *Profit*, 591 N.W.2d at 462; 28 Am. Jur. 2d *Estoppel and Waiver* § 74; 31 C.J.S. *Estoppel and Waiver* § 139(a).

Assuming, without deciding, that the doctrine of judicial estoppel applies in this state, we conclude the doctrine would not bar MDU's arguments because the position taken by MDU in this case is not inconsistent with the position it took in *Koch*. In that case, Koch sued MDU for breach of contract, seeking to recover the difference between the amount Koch would have received if MDU had purchased the gas at the higher contract rate and the amount Koch actually received selling the gas on the open market. Koch sought to recover 100 percent of the difference, including the 75 percent it would have passed on to the producers under the percentage-of-proceeds contracts. MDU argued Koch could recover only its own losses, represented by the 25 percent Koch would retain upon sale of the gas. The United States Court of Appeals for the Eighth Circuit agreed with MDU:

> In this appeal, Koch argues that the damage award should not have been reduced, since Koch may yet be obligated to reimburse the producers for their seventy-five percent share. We reject this argument. The court did not enforce the contract by ordering specific performance but merely awarded Koch its actual damages. MDU was not ordered to take the gas and pay for it, in which case Koch would be liable to the producers for a percentage of the proceeds. The other producers did not intervene in Koch's suit, and Koch should be allowed to collect only the damages it sustained. If the gas was

> not sold, Koch did not owe the producers their cut; if Koch did sell to other customers the gas that MDU had contracted to buy, Koch presumably paid the producers the appropriate percentage from those proceeds, and the producers would have no further recourse against Koch.
>
> We believe the court correctly found that Koch could not prove that it sustained three-quarters of the damages claimed, and that Koch did not prove that it would be liable in the future to pay producers for gas not sold merely because Koch collects on a judgment for its damages resulting from MDU's breach. The percentage-of-proceeds reduction in damages is affirmed.

Koch, 988 F.2d at 1547.

BTA contends, because MDU argued in Koch that the producers were the real parties in interest as to 75 percent of the damages and bore the burden of that loss, MDU should now be estopped from arguing it is not liable to the producers for those losses. BTA cited the following quotations from MDU's pleadings and briefs in Koch as examples of positions inconsistent with MDU's defenses in this case:

> "It is axiomatic that the real party in interest in an action for damages is the party who has, or can at least offer evidence that he has, actually been damaged by the underlying events. . . . [V]irtually all of the effects of reduced gas cost and things like that were passed on to the producers."
>
> . . . .
>
> "[M]uch of the burden of decreased gas prices is passed up the line to producers who sell to Koch."
>
> . . . .

"As a result of all these various arrangements, when MDU reduced its purchases from Koch, the producers bore the burden."

. . . .

"As a result, when MDU reduced its purchases from Koch, the producers sustained a 75% share of the deduction from the price differential, Koch took at most a 25% share of the loss."

The issue in *Koch* was whether Koch could recover 100 percent of the difference between the contract price and the price it actually received when it sold the gas elsewhere. MDU argued Koch was not the real party in interest as to 75 percent of the difference and the producers bore that loss. MDU did not, however, concede or otherwise imply it was liable to the producers for that loss. The statements quoted by BTA are not admissions of liability to the producers but merely arguments, within the context of that litigation, that Koch had not suffered those losses. Furthermore, the extent of MDU's liability to Koch for breach of their contract and MDU's potential liability to the producers for unjust enrichment or implied trust are entirely different and distinct issues. BTA has not shown any position taken by MDU in Koch was inconsistent with its arguments in this case.

We conclude the doctrine of judicial estoppel, if recognized in this state, would not bar MDU from challenging the unjust enrichment and implied trust claims in this case.

IV

BTA contends the trial court erred in granting summary judgment dismissing its unjust enrichment and implied trust claims against MDU.

We addressed identical issues raised against MDU by other producers in *Apache Corp. v. MDU Resources Group, Inc.*, 1999 ND 247, 603 N.W.2d 891. In that case, Apache Corporation and Snyder Oil Corporation, producers who were

selling gas to Koch under percentage-of-proceeds contracts, sued MDU after it breached its contracts with Koch. The producers argued they were third-party beneficiaries under the MDU-Koch contracts, MDU was unjustly enriched by its repudiation of its contracts with Koch, and MDU held damages in an implied trust. The trial court dismissed the producers' claims, and they appealed. BTA and the other producers in this case filed an *amicus curiae* brief in support of Apache and Snyder. *See Apache*, at ¶ 8.[1]

We affirmed the dismissal of the producers' claims, concluding the producers were not third-party beneficiaries under the MDU-Koch contracts, MDU had not been unjustly enriched, and there was no evidence to establish an implied or constructive trust. (1) In rejecting the unjust enrichment claim, we explained:

> Apache benefited when MDU performed MDU's contract with Koch. Although MDU saved money by breaching its contract with Koch, and Apache received less money from Koch when MDU breached its contract with Koch, MDU contracted with Koch and not with Apache. The money MDU saved by breaching its contract with Koch was not a "benefit at the direct expense of" Apache. [*Midland Diesel Serv. & Engine Co. v.*] *Sivertson*, 307 N.W.2d [555,] 557 [(N.D. 1981)]. Apache's reduced income resulted from its use of a percentage of proceeds as a pricing factor in its agreements with Koch, which contemplated increases or decreases in gas prices. Where the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity. *Albrecht [v. Walter]*, 1997 ND 238, ¶ 23, 572 N.W.2d 809. Thus, we are

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[1] On this appeal, BTA concedes it is not a third-party beneficiary under the MDU-Koch contracts. BTA has not provided any argument or citations to support an implied trust in this case.

> unpersuaded the essential element of recovering under a theory of unjust enrichment- "receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value"-is present here. *Zuger [v. North Dakota Ins. Guar. Ass'n]*, 494 N.W.2d [135], 138 [(N.D. 1992)].

Apache, 1999 ND 247, ¶ 15, 603 N.W.2d 891.

BTA does not argue there are factual distinctions between this case and *Apache*. Nor has BTA drawn our attention to different provisions in the percentage-of-proceeds contracts involved here. In essence, the facts of the two cases are identical and arise from the same series of transactions.

BTA does not attempt to distinguish *Apache*, but invites us to overrule our decision in that case. We decline to do so. Unjust enrichment requires a showing of an enrichment, an impoverishment, and a connection between the two. *Apache*, 1999 ND 247, ¶ 13, 603 N.W.2d 891; *Albrecht v. Walter*, 1997 ND 238, ¶ 23, 572 N.W.2d 809. When the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity and there has been no unjust enrichment. *Apache*, at ¶ 15; *Albrecht*, at ¶ 23. BTA has not cited a single decision allowing a third-party supplier to recover for unjust enrichment under facts similar to this case. Any enrichment of MDU and impoverishment of BTA in this case was the result of BTA's voluntary contractual arrangement with Koch.

We decline to overrule Apache and conclude the district court did not err in dismissing the claims against MDU.

V

BTA argues the trial court erred in granting summary judgment dismissing its breach of contract and unjust enrichment claims against Koch.

A

BTA contends Koch breached its contracts with the producers by failing to apprise them of "major developments" in the *Koch v. MDU* litigation. Shortly after suing MDU in federal court in January 1987, Koch sent a letter to the producers outlining the history of the dispute over the contract price after deregulation and indicating Koch had filed suit against MDU. The letter indicated Koch would apprise the producers of any "major developments." BTA argues Koch had thereby contractually agreed to notify the producers of any "major developments" in the federal litigation, and Koch breached the contract when it failed to notify them the court had held Koch could only recover 25 percent of the damages sought.

Assuming, without deciding, that Koch breached an agreement when it failed to apprise the producers of the alleged "major development," we conclude the trial court did not err in granting summary judgment, because BTA has not shown it suffered damages caused by the alleged breach. See *Hummel v. Mid Dakota Clinic, P.C.*, 526 N.W.2d 704, 709 (N.D. 1995).[2] In support of its assertion that Koch should be liable for "millions of dollars" in damages for failing to apprise the producers of the court's holding in the federal litigation, BTA argues it could have intervened in that case or taken other affirmative steps to protect its interests against MDU if it had been apprised of this "major development." BTA's entire argument is premised upon its belief it could have recovered damages from MDU had it learned earlier of the federal court's ruling. In *Apache* and this case, however, we have held the producers had no valid claim for damages against MDU. BTA lost no rights against MDU by Koch's failure to notify it of the federal court's ruling, because BTA has been afforded the full opportunity to litigate its claims

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[2] BTA did not argue it was entitled to nominal damages. *See Hummel*, 526 N.W.2d at 709.

against MDU and has failed to demonstrate how a different result would have been reached had it acted earlier to protect its interests against MDU.

B

BTA argues Koch breached its contracts with the producers when it failed to share the settlement proceeds it received from MDU in the *Koch v. MDU* litigation. BTA claims the producers are entitled to 75 percent of the settlement proceeds.

In its brief on appeal, BTA argues "the settlement was expressly an agreement to settle the Koch v. MDU case," and "Koch had sued for the price differential on 100% of contract volumes." However, at the time Koch and MDU settled, the federal district court and the United States Court of Appeals for the Eighth Circuit had held Koch could recover only its own 25 per cent loss, and "Koch did not prove that it would be liable in the future to pay producers for gas not sold merely because Koch collects on a judgment for its damages resulting from MDU's breach." *Koch*, 988 F.2d at 1547. The case was remanded to the district court for reconsideration of damages and other issues between MDU and Koch. See id. at 1548.

The settlement agreement was reached after, and must be read in context with, the opinion of the United States Court of Appeals for the Eighth Circuit in *Koch*. It is clear the 75 percent of "damages" represented by the producers' percentage of proceeds had been effectively removed from the case. When MDU and Koch settled their claims, they could settle only Koch's own 25 percent of the losses. *See Koch*, 988 F.2d at 1547 ("The other producers did not intervene in Koch's suit, and Koch should be allowed to collect only the damages it sustained."). Any liability of MDU for the remaining 75 percent was left for subsequent litigation between the producers and MDU. The producers' alleged damages were not "settled" by MDU and Koch; the producers claims against MDU have been "settled" by our opinions in *Apache* and this case.

We conclude the producers were not entitled to share in the settlement proceeds and Koch's failure to share the proceeds was not a breach of contract.

C

BTA argues Koch breached a duty of good faith owed to the producers when it entered into the settlement agreement with MDU. BTA contends there was an implied covenant of good faith and fair dealing included in the gas purchase contracts between the producers and Koch and, in addition, some of the contracts expressly required Koch to make good faith efforts to sell the gas to MDU. BTA has drawn our attention to the following language in a purchase contract between Koch and Sinclair Oil Corporation: "[Koch] shall exert diligent and good faith efforts to sell all of Producer's Plant Output of Residue Gas to [MDU]." BTA argues Koch violated its duty of good faith when it agreed to a buyout and termination of its contracts with MDU in settling the *Koch v. MDU* litigation.

BTA's argument wholly ignores the realities of the situation leading to the settlement. MDU had repudiated its contracts with Koch and stopped accepting gas in 1987. Koch sued MDU, and through six and one-half years of litigation, sought at its own expense to recover full damages on behalf of the producers. The producers did not seek to intervene or otherwise assist in financing the lengthy litigation against MDU. Koch pursued the claims, including those that would have benefitted the producers, to the United States Court of Appeals. Only after that court unequivocally held Koch could not recover damages that would benefit the producers did Koch settle its claims against MDU.

Koch could not require MDU to resume accepting gas at the pre-deregulation price, and Koch had engaged in costly litigation seeking to secure payment for the producers. BTA has not presented any evidence establishing Koch's settlement with MDU breached any duty of good faith owed to the producers.

Furthermore, the Koch-Sinclair contract provision relied upon by BTA, read in its entirety, clearly demonstrates the parties anticipated the gas might not be sold to MDU and made explicit provisions for that eventuality:

> [Koch] shall exert diligent and good faith efforts to sell all of Producer's Plant Output of Residue Gas to [MDU] (as [Koch] does with respect to all producers on its system); and if not purchased by [MDU], and Producer does not instruct otherwise, [Koch] shall exert diligent and good faith efforts (as [Koch] does in behalf of all producers on its system, unless they instruct otherwise) to sell the portion remaining of Producer's Plant Output of Residue Gas to other purchasers on the terms and for the Net Sales Proceeds which [Koch], in its sole judgment, considers best . . . .

BTA has not drawn our attention to evidence in this record demonstrating Koch failed to exert "diligent and good faith efforts" to sell the producers' gas to MDU. When MDU repudiated the contract and refused to accept gas from Koch, Koch sold the gas to other purchasers and paid the producers 75 percent of the proceeds. Under these circumstances, Koch did not breach its contracts with the producers.

D

BTA contends the district court erred in granting summary judgment dismissing its unjust enrichment claim against Koch.

The determination of unjust enrichment is a conclusion of law and is fully reviewable on appeal. *Schroeder v. Buchholz*, 2001 ND 36, ¶ 14, 622 N.W.2d 202; *Apache*, 1999 ND 247, ¶ 13, 603 N.W.2d 891. Unjust enrichment is an equitable doctrine based upon quasi- or constructive contracts implied by law to prevent a party from being unjustly enriched at another's expense. Schroeder, at ¶ 14; *In re Estate of Hill*, 492 N.W.2d 288, 295 (N.D. 1992). It is well-settled,

unjust enrichment in this context applies only in the absence of a contract between the parties, and there can be no implied-in-law contract when there is an express contract between the parties relative to the same subject matter. *See, e.g., Dalan v. Paracelsus Healthcare Corp.*, 2002 ND 46, ¶ 24; *Schroeder*, at ¶¶ 14, 18; *Apache*, at ¶ 13; *Estate of Hill*, 492 N.W.2d at 294-95 n.1; *First Nat'l Bank of Belfield v. Burich*, 367 N.W.2d 148, 154 (N.D. 1985); Cavalier County Mem'l Hosp. Ass'n v. Kartes, 343 N.W.2d 781, 785 (N.D. 1984).

We agree with the reasoning of the United States Court of Appeals for the Eighth Circuit in JN Exploration & Prod. v. Western Gas Res., Inc., 153 F.3d 906, 910 (8th Cir. 1998) (footnotes omitted), in which the court summarized application of the doctrine under North Dakota law:

> Because unjust enrichment is synonymous with quasi contract, and because in North Dakota quasi contractual principles find no application in the face of an express contract, it follows necessarily that in the face of an express contract, an action for unjust enrichment cannot lie. The Supreme Court of North Dakota has repeatedly recognized this, stating, "the doctrine [of unjust enrichment] serves as a basis for requiring restitution of benefits conferred in the absence of an express or implied in fact contract." *Sykeston Township [v. Wells County]*, 356 N.W.2d [136,] 139 [(N.D. 1984)] (emphasis added); see also D.C. *Trautman Co. [v. Fargo Excavating Co.]*, 380 N.W.2d [644,] 645 [(N.D. 1986)] (unjust enrichment applies in the absence of an express or implied in fact contract); [First Nat'l Bank of Belfield v.] Burich, 367 N.W.2d [148,] 154 [(N.D. 1985)] (same). In Burich, the Supreme Court of North Dakota highlighted the incompatibility of unjust enrichment and an express contract when it concluded, "[i]n this instance, an express contract existed between

> Burich and the Bank and therefore it was error to rely on the theory of unjust enrichment." 367 N.W.2d at 154. In short, because unjust enrichment is grounded in quasi contract, where, as here, the parties have voluntarily entered into an express written contract which defines the rights of each, unjust enrichment is a non sequitur.

BTA argues the decision in *JN Exploration* conflicts with earlier decisions of this Court, citing *Trauger v. Helm Bros., Inc.*, 279 N.W.2d 406 (N.D. 1979), *Fiebiger v. Fischer*, 276 N.W.2d 241 (N.D. 1979), and *Cargill, Inc. v. Kavanaugh*, 228 N.W.2d 133 (N.D. 1975). In those cases, this Court stated: "Where an action sounds in contract, invocation of equity powers of court is inappropriate in absence of showing of unjust enrichment, fundamental unfairness, or miscarriage of law requiring intervention of equitable principles." *Trauger*, at 414; *Fiebiger*, at 246; see also Cargill, at 140. None of these cases involved an attempt to impose an implied-in-law, quasi-contract theory of unjust enrichment when there was an express agreement between the parties. Rather, those cases were merely recognizing that when an extraordinary equitable remedy--such as restitution or reformation--is sought in a contract case, extraordinary circumstances must be shown. These cases do not conflict with the holding in later cases of this Court that unjust enrichment based upon quasi-contract is unavailable if there is an express contract between the parties.

BTA also quotes Dan B. Dobbs, Law of Remedies § 12.7(1) (2d ed. 1993), which states: "Restitution - recovery of benefits conferred - is permitted to prevent unjust enrichment. Restitution is an important remedy in connection with contracting." BTA argues this language indicates an action for unjust enrichment may lie even if the parties had an express contract that was not breached. However, the heading of the above section quoted from Dobbs is "Money Awards as Restitution for Breach of Contract." Dobbs is addressing

restitution as an element of damages for breach of contract, not the separate equitable remedy for unjust enrichment based upon quasi-contract.

Finally, we reiterate our conclusion in *Apache*, 1999 ND 247, ¶ 15, 603 N.W.2d 891:

> [The producers'] reduced income resulted from [their] use of a percentage of proceeds as a pricing factor in [their] agreements with Koch, which contemplated increases or decreases in gas prices. Where the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity.

We conclude the district court did not err in dismissing BTA'sunjust enrichment claim against Koch.

E

In resolving BTA's breach of contract and unjust enrichment claims against Koch, we are mindful of the unique circumstances presented in this case. BTA seeks to recover damages when it is clear it has suffered no "loss" under its contract with Koch. BTA received the full benefit of its bargain--75 percent of the proceeds Koch received upon sale of the processed gas. Any "loss" suffered by the producers is a result of their voluntary choice to enter into percentage-of-proceeds contracts, which envisioned the possibility of lower prices. The Koch-Sinclair contract cited by BTA expressly contemplated the gas might be sold to someone other than MDU, and made provisions for the parties' rights in that event. For example, the Sinclair contract provided, if the producer was dissatisfied with sales of gas to an entity other than MDU, the producer could direct Koch to discontinue such sales.

Simply put, the producers entered into a contract with Koch and received full performance under the terms of that contract. Any "loss" they suffered directly resulted from their

decision to enter into the percentage-of-proceeds contracts, not from any wrongdoing by Koch.

VI

BTA argues the district court erred in granting summary judgment dismissing its breach of contract claim against Koch based upon sale of liquid hydrocarbons from its gas.

In addition to receiving a percentage of the proceeds from the processed natural gas, the producers' contracts with Koch provided the producers would also receive a percentage of the proceeds from the sale of liquid hydrocarbons extracted from the gas they sold to Koch. BTA contends Koch sold these liquid hydrocarbons to its own subsidiaries and affiliates for less than market price, resulting in losses to some of the producers. BTA claimed this was a breach of contract and sought an accounting for the liquid hydrocarbons sold under the producers' contracts with Koch. On Koch's motion for summary judgment, the district court determined BTA had failed to raise a genuine issue of material fact on the liquid hydrocarbons claim and granted summary judgment dismissing the claim.

Once a party seeking summary judgment has met its initial burden of showing no genuine issue of material fact exists, the opposing party may not simply rely upon its pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact. *Anderson v. Meyer Broadcasting Co.*, 2001 ND 125, ¶ 14, 630 N.W.2d 46. The resisting party must draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact. *Id.* Summary judgment is appropriate against a party that fails to establish the existence of a factual dispute on an essential element of its claim and on which it will bear the burden of proof at trial. *Id.* at ¶ 15.

BTA argues paragraph 8 of the affidavit of its expert, Carol Freedenthal, raised material issues of fact on its claim Koch had transferred liquid hydrocarbons to its subsidiaries or affiliates for less than market value. Freedenthal prefaces this paragraph by noting "my observations and analysis are only preliminary at this point." Freedenthal then states:

> Koch is accepting less than market prices for the liquid products and thus short changing the Producers from moneys owed to them. . . . In selling for less than market acceptable prices, Koch may be giving its so-called subsidiary and affiliated companies product at lower than market prices and at the same time, using its affiliates andsubsidiaries for Koch's additional profit and abuse of the Producers.

Affidavits offered in opposition to a motion for summary judgmentmust set forth specific facts showing there is a genuine issue for trial. N.D.R.Civ.P. 56(e); *Ellingson v. Knudson*, 498 N.W.2d 814, 818 (N.D. 1993). Affidavits containing conclusory statements unsupported by specific facts are insufficient to raise a material factual dispute. *Fetch v. Quam*, 2001 ND 48, ¶ 19, 623 N.W.2d 357; *Norwest Mortgage, Inc. v. Nevland*, 1999 ND 51, ¶ 4, 591 N.W.2d 109; *Resolution Trust Corp. v. Gosbee*, 536 N.W.2d 698, 701 (N.D. 1995); *Federal Land Bank of St. Paul v. Asbridge*, 414 N.W.2d 596, 598 (N.D. 1987). Mere speculation will not defeat a motion for summary judgment. *Ellingson*, at 818.

Freedenthal's affidavit is conclusory and speculative. He expressly indicates his "observations and analysis are only preliminary" and "Koch may be giving its so-called subsidiary and affiliated companies product at lower than market prices." Freedenthal's conjecture and speculation is unsupported by specific facts detailing what the market price was and how these sales deviated from that market price. Feeedenthal does not provide a single example of a below-market sale relating to a specific contract or specific producer. Freedenthal's affidavit does not provide competent admissible

evidence raising a genuine issue of material fact on the sale of the liquid hydrocarbons.

BTA also cites other evidence showing Koch used interaffiliate transfers as "sales" of liquid hydrocarbons, paid its own affiliates to transport the liquid hydrocarbons, and charged various fees through its affiliates and subsidiaries, which lowered the price the producers ultimately received for the liquid hydrocarbons. However, without a showing that the ultimate amount received for specific sales was less than would have been received in sales to third parties at market price, this evidence does not create an issue of material fact on the necessary elements of BTA's breach of contract claim.

BTA suggests it was unable to provide more specific evidence on the liquid hydrocarbons claim because it had not yet completed discovery and Koch had "stonewalled" some of BTA's discovery requests. BTA did not move under N.D.R.Civ.P. 56(f) for a continuance to conduct further discovery to develop additional evidence to oppose the motion for summary judgment. The possibility that further discovery will yield evidence favorable to a party opposing summary judgment is not a ground to deny the motion when the party has failed to invoke N.D.R.Civ.P. 56(f). *Opp v. Source One Mgmt., Inc.*, 199 ND 52, ¶ 11, 591 N.W.2d 101; *American State Bank and Trust Co. v. Sorenson*, 539 N.W.2d 59, 62 (N.D. 1995); *Hummel v. Mid Dakota Clinic, P.C.*, 526 N.W.2d 704, 708 (N.D. 1995). Because BTA did not comply with N.D.R.Civ.P. 56(f), the alleged incomplete state of discovery provides no basis to reverse the summary judgment. *Hummel*, at 708.

BTA had ample opportunity to conduct discovery. When Koch moved for partial summary judgment in August 1999, the case had been in litigation and discovery had been proceeding for nearly two and a half years. Another year passed before the court finally entered its order for judgment granting partial summary judgment dismissing the liquid hydrocarbons claim against Koch. Under these circumstances, including its failure to invoke N.D.R.Civ.P. 56(f), BTA

cannot now be heard to suggest its insufficient response to the motion for summary judgment was due to an inadequate opportunity to conduct discovery.

We conclude the court did not err in granting summary judgment dismissing the liquid hydrocarbons claim.

VII

Exxon Corporation argues the district court applied the wrong statute of limitations governing its separate claim against Koch for breach of contract for incorrectly calculating "treating fees."[3]

Under Exxon's contract with Koch, Koch was entitled to deduct certain treating fees from the amount it paid Exxon upon resale of the processed gas. Exxon alleges Koch miscalculated the treating fees, resulting in overcharges against Exxon's share of the proceeds from the processed gas. The district court concluded Koch had breached the contract by using an improper method to calculate treating fees, resulting in an underpayment to Exxon for its gas.

In calculating damages for the breach, the court determined the contract was governed by the Uniform Commercial Code (N.D.C.C. Title 41) and applied the four-year statute of limitations of N.D.C.C. § 41-02-104 (U.C.C. § 2-725). The court further determined Exxon filed its claim on September 3, 1997, when the plaintiffs, including Exxon, moved for leave to file an amended complaint. The court accordingly awarded damages incurred after September 3, 1993, in the amount of $404,122.34.

A

Exxon argues its contract with Koch was not a "contract for sale" under the U.C.C. and the four-year statute of limitations under N.D.C.C. § 41-02-104(1) (U.C.C. § 2-725)

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[3] Exxon was the only producer that pleaded a "treating fees" claim.

should not have applied. Exxon contends the general six-year statute of limitations for non-U.C.C. contracts found in N.D.C.C. § 28-01-16(1) should have applied.

The U.C.C., as adopted in North Dakota, applies to a contract for sale of natural gas. See N.D.C.C. § 41-02-05(2) (U.C.C. § 2-105); *JN Exploration & Prod. v. Western Gas Res., Inc.*, 153 F.3d 906, 913 (8th Cir. 1998); *Koch*, 988 F.2d at 1534; *see also Dawn Enters. v. Luna*, 399 N.W.2d 303, 306 n.3 (N.D. 1987). Section 41-02-104(1) (U.C.C. § 2-725) provides "[a]n action for breach of any contract for sale must be commenced within four years after the claim for relief has accrued."

"Contract for sale" is defined in N.D.C.C. § 41-02-06(1)(b) (U.C.C. § 2-106): "'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time." Section 41-02-06(1)(d) (U.C.C. § 2-106) provides: "'Sale' consists in the passing of title from the seller to the buyer for a price."

Exxon argues the contract at issue in this case is a gas processing contract for services, and is not a contract for sale under the U.C.C. The contract, however, provides gas will be delivered from Exxon to Koch at metering facilities at or near the wellhead, and "title to said gas and all constituent components therein shall pass from [Exxon] to [Koch] at said point(s)." Article VIII of the contract is entitled "PRICE," and provides, in part:

> The price to be paid by [Koch] to [Exxon] shall be an amount equal to eighty percent (80%) of the net sales proceeds received for the liquefiable hydrocarbons and residue gas saved and sold which is attributable to [Exxon's] gas as determined in Article V hereof, less the fees attributable thereto.

The contract specifies title to the gas passes from Exxon to Koch at the wellhead, before any processing of the gas takes place, and sets a price for the gas to be paid by Koch to

Exxon. See N.D.C.C. § 41-02-06(1)(b) and (d) (U.C.C. § 2-106). This is a contract for sale.

The substantive provisions of the contract are analogous to those in *JN Exploration*, which the United State Court of Appeals for the Eighth Circuit concluded was a contract for sale governed by the U.C.C. under North Dakota law. *JN Exploration*, 153 F.3d at 912-13. The court in *JN Exploration* specifically noted the "producer/processor relationship" in that case was "nearly identical" to the one presented in Koch, and the two cases presented "nearly identical facts and an analogous contract." *JN Exploration*, 153 F.3d at 912-13. The producer/processor contracts at issue in Koch are the same contracts at issue in this case.

Exxon argues the contract must be for gas processing services, and not a sale, because it is entitled "Gas Processing Agreement" and the parties are identified throughout the contract as "Producer" and "Processor." In determining whether an agreement is a contract for sale governed by the U.C.C., the labels used by the parties to characterize the transaction are not determinative; rather, it is the substance of the transaction and intent of the parties which control. *See American Family Mut. Ins. Co. v. Jepson*, 148 F.3d 954, 955-56 (8th Cir. 1998); *Western Enters., Inc. v. Arctic Office Machs., Inc.*, 667 P.2d 1232, 1234 (Alaska 1983); Lease Finance, Inc. v. Burger, 575 P.2d 857, 859 (Colo. Ct. App. 1977). In this case, the substantive provisions of the contract clearly establish a contract for sale.

Exxon also contends, the fact it had an option to take processed gas rather than cash in payment for its gas indicates this is a service contract, not a contract for sale. Under Article VIII of the contract, entitled "PRICE," Koch was to pay 80 percent of the net sales proceeds it received from the processed gas and liquid hydrocarbons to Exxon as payment for Exxon's raw gas. As an alternative, Exxon had the option to receive 80 percent of the processed gas and liquid hydrocarbons attributable to its gas. In order to exercise this option, Exxon was required to give Koch sixty days written

notice. We do not believe this provision changes the basic substantive nature of the contract. The title to the gas still passed to Koch at the wellhead before any processing took place. Article VIII of the contract specified the price to be paid for the gas, giving Exxon the option of having that "price" be paid in processed gas and liquid hydrocarbons. The hallmarks of a contract for sale under N.D.C.C. § 41-02-06 (U.C.C. § 2-106) are present.

We conclude the court did not err in determining the parties' agreement was a contract for sale governed by the U.C.C., and the four-year statute of limitations under N.D.C.C. § 41-02-104(1) (U.C.C. § 2-725) applied.

B

Exxon contends the district court erred in concluding Exxon first asserted its treating fees claim, for purposes of the statute of limitations, on September 3, 1997.

Exxon was not a party when this action began on March 14, 1997. On June 30, 1997, Exxon filed a motion to intervene as a plaintiff in the action and attached a proposed complaint that included a claim for breach of contract against Koch based upon the disputed calculation of treating fees. The court granted Exxon's motion to intervene by a written order filed on July 18, 1997.

On September 3, 1997, Exxon and the other plaintiffs moved to file an amended complaint, which added new allegations and included Exxon's treating fees claim. The court granted the motion to amend the complaint on February 18, 1998.

The district court ultimately determined Koch had breached its contract with Exxon by improperly calculating treating fees, resulting in a substantial underpayment to Exxon for its gas. The court concluded Exxon had first asserted its treating fees claim on September 3, 1997, when the plaintiffs moved to amend the complaint, and therefore determined any claim for treating fees arising more than four

years prior to that date was barred by the statute of limitations. On appeal, Exxon argues the court erred in determining the date it first asserted the treating fees claim, contending it adequately raised the claim when it filed its complaint with the motion to intervene on June 30, 1997.

The procedure governing intervention is set out in N.D.R.Civ.P. 24(c), which provides in part:

> A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

The rule explicitly requires a pleading setting forth the intervenor's claims or defenses be attached to the motion. Courts construing corresponding federal or state rules have consistently held the filing of a motion to intervene, accompanied by a proper pleading, constitutes the commencement of an action for purposes of the statute of limitations. *See United States ex rel. Canion v. Randall & Blake*, 817 F.2d 1188, 1192 (5th Cir. 1987); *Braxton v. Virginia Folding Box Co.*, 72 F.R.D. 124, 126 (E.D. Va. 1976); *Securities and Exch. Comm'n v. Keller Bros. Sec. Co.*, 30 F.R.D. 532, 533-34 (D. Mass. 1962); *Jack v. Travelers Ins. Co.*, 22 F.R.D. 318, 319 (E.D. Mich. 1958), *aff'd*, 277 F.2d 736 (6th Cir. 1960); *Ioannou v. Ivy Hill Park Section Four, Inc.*, 270 A.2d 295, 301-02 (N.J. Super. Ct. Law Div. 1970); *Callaway v. Ryan*, 354 P.2d 999, 1001-02 (N.M. 1960); *Engert v. Peerless Ins. Co.*, 382 S.W.2d 541, 550 (Tenn. Ct. App. 1964); 7C *Charles Alan Wright et al., Federal Practice and Procedure* § 1914 (2d ed. 1986); *see also Farris v. Sears, Roebuck & Co.*, 415 F. Supp. 594, 595-96 (W.D. Ky. 1976) (service of motion to intervene with attached pleading is not commencement of an action, but tolls the statute of limitations).

These courts have concluded, if the motion to intervene is subsequently granted, the attached pleading will be considered effective from the time the motion was originally filed for purposes of the statute of limitations. In the seminal case Jack v. Travelers Ins. Co., 22 F.R.D. at 319, the court explained:

> Applicants were required under Rule 24 to seek leave before they might file their complaint in intervention. . . . Who can possibly predict what length of time might elapse between the filing of a motion to intervene and a final order granting it? There are time factors to be taken into consideration - a hearing date in open court dependent upon the condition of the docket when the motion is filed, the possibility of counsel requesting time for the filing of briefs, the inability of the Court to study the briefs at the exact moment of their delivery, and a number of other factors which are obvious to those accustomed to processing motions. No matter how diligent counsel for an applicant intervenor may be, we do not perceive what guarantee can be available that there will be an opportunity to file the complaint prior to the running of the statute.

The United States Court of Appeals for the Fifth Circuit further explained the rationale for the rule in Randall & Blake, 817 F.2d at 1192 (footnote omitted):

> We have found, however, almost unanimous agreement among the district courts addressing the question: the filing of the motion for intervention, and not the later approval of the motion and actual filing of the complaint, determines the commencement of the action for purposes of the statute of limitations. We find this rule to be the only sensible one and adopt it as our own. Once the party seeking intervention has filed its motion to intervene with its proposed complaint, it has done all it can do, in a timely sense, to commence its

> action. The complaint cannot be filed until the court approves the intervention. Here, Geer Construction filed its motion to intervene well before the expiration of the limitation period. The district court did not act on that motion, however, for over fourteen months. We see no justification for a rule that would bar a meritorious action as untimely because of a congested court docket or other circumstances over which the claimant has absolutely no control.

We agree with the rationale of these cases. Because the rule requires that a copy of the intervening party's pleading accompany the motion and be served upon all of the parties, it would be superfluous to require a subsequent motion explicitly requesting amendment of the pleadings after the court grants the motion to intervene. We will not interpret our rules in a manner that would result in unnecessary, duplicative procedures.

We agree with the courts that hold an intervenor's action is begun, for purposes of the statute of limitations, upon the making of a proper motion under Rule 24, accompanied by an appropriate pleading, which is subsequently granted by the court. Accordingly, we conclude the trial court erred in determining Exxon first asserted its treating fees claim against Koch on September 3, 1997, when the plaintiffs moved to amend the complaint. Exxon's treating fees claim was begun, for purposes of the statute of limitations, when it filed and served its motion to intervene under N.D.R.Civ.P. 24. We therefore reverse and remand for recalculation of damages to Exxon on its treating fees claim.

VIII

We have considered the remaining issues raised by BTA and find them to be either without merit or unnecessary to our decision. We do not answer questions that are not necessary to the determination of an appeal. E.g., Johnson v. Johnson, 2001 ND 109, ¶ 13, 627 N.W.2d 779.

We reverse and remand that part of the judgment awarding Exxon damages on its treating fees claim for recalculation of damages in accordance with this opinion. In all other respects the judgment is affirmed.

/s/_____
Dale V. Sandstrom
Carol Ronning Kapsner
Mary Muehlen Maring
Gerald G. Glaser, S.J.
William A. Neumann, acting C.J.

B-1

IN THE DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF STARK

BTA OIL PRODUCERS, CENEX HARVEST STATES COOPERATIVES, CONOCO INC., EQUITABLE RESOURCES ENERGY COMPANY, EXXON CORPORATION, MIDGARD ENERGY COMPANY, (formerly known as MAXUS EXPLORATION COMPANY), SINCLAIR OIL CORPORATION, KERR-McKEE OIL & GAS ONSHORE, LP, TBI EXPLORATION, INC. (formerly known as PRESIDIO EXPLORATION, INC.), TIPPERARY OIL & GAS CORPORATION, AND TOM BROWN, INC.

Plaintiffs,

vs.

MDU RESOURCES GROUP, INC., (formerly known as Montana-Dakota Utilities Company), WILLISTON BASIN INTERSTATE PIPELINE COMPANY, INC., KOCH INDUSTRIES, INC., and KOCH HYDROCARBONS COMPANY.

Defendants.

Civil No. 97C-089

Filed
MAR 5 2001

JUDGMENT

This matter came before this court on Motions for Summary Judgment by the Defendants, MDU Resources Group, Inc., Williston Basin Interstate Pipeline Company (MDU/WBI), and Koch Industries, Inc., and Koch Hydrocarbons Company (Koch), and the subsequent Cross-Motions for Summary Judgment by the Plaintiff, Exxon

Corporation (Exxon),[1] and Koch. Oral arguments on said Motions were presented to the above entitled Court, the Honorable Allan Schmalenberger, District Judge, presiding. The Plaintiffs were represented by James B. Wilcox, Jr., of the firm of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., and Albert J. Hardy of the firm of Hardy, Maus & Nordsven, P.C. The Defendants, MDU/WBI, were represented by Daniel S. Kuntz and James S. Hill of the firm of Zuger, Kirmis & Smith. The Defendants Koch were represented by Michael A. Ceramella of Koch and John A. Morrison of the firm of Fleck, Mather & Strutz, Ltd.

The Court having heard the arguments of counsel and being fully advised in this matter and having issued its Order for Judgment dated October 4, 2000, on the Motion for Summary Judgment of the Defendants, and further having issued its Recitation of Undisputed Facts, Conclusions of Law and Order for Judgment on January 25, 2001, on the Cross Motions for Summary Judgment of Exxon and Koch;

NOW, THEREFORE, In accordance with the aforesaid Order for Judgment dated October 4, 2000, and the aforesaid Recitation of Undisputed Facts, Conclusions of Law and Order for Judgment dated January 25, 2001,

IT IS ADJUDGED, DETERMINED AND DECREED That:

1. The Plaintiffs' Complaint on its claim for unjust enrichment against MDU/WBI is dismissed with prejudice;

2. The Plaintiffs' Complaint seeking damages arising from an implied trust against MDU/WBI is dismissed with prejudice;

3. The Plaintiffs' Complaint for unjust enrichment against Koch is dismissed with prejudice;

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[1] Exxon Corporation merged with Mobil Corporation and all references herein to "Exxon" refer to Exxon Mobil Corporation.

4. The Plaintiffs' Complaint for breach of contract against Koch is dismissed with prejudice;

5. The Plaintiffs' Complaint alleging a claim of fraud against Koch is dismissed with prejudice;

6. The Plaintiffs' Complaint claim against MDU/WBI and Koch for civil conspiracy is dismissed with prejudice;

7. The Plaintiffs' Motion for leave to file a Second Amended Complaint is denied;

8. The Plaintiffs had also filed second and third motions to compel discovery from both MDU/WBI and Koch, an additional motion to compel discovery from Koch and to award sanctions, and a motion for leave to supplement their second motion to compel discovery from Koch. Koch in turn had filed a motion to strike Plaintiffs' reply brief. All of these motions are denied as moot.

IT IS FURTHER ADJUDGED, DETERMINED AND DECREED That:

1. Koch breached Contract MCK-1590 by underpaying Exxon through failing to determine treating fees under Section 7.1 of said Contract by using decimal or fractional interests instead of whole numbers as percents and percentages;

2. Contract MCK-1590 is governed by the Uniform Commercial Code. Exxon's claim that Koch breached the Contract is subject to the four year statute of limitations as contained in NDCC § 41-02-104, and for purposes of said statute Exxon filed its treating fee claim when Plaintiffs filed their Motion for leave to submit their First Amended Complaint, which was on September 3, 1997;

3. Exxon shall have Judgment against the Defendant Koch in the principal amount of $307,774.50, together with simple interest at the annual rate of 6%, or interest in a total amount of $96,347.84 through October 31, 2000, and additional interest thereafter in an amount equal to $50.60

($307,774.50 x .06/365) per day from November 1, 2000, and until the day this Judgment is entered, and post-judgment interest thereafter in accordance with Section 28-20-34 of the North Dakota Century Code;

IT IS FURTHER ADJUDGED, DETERMINED AND DECREED That none of the parties hereto shall be awarded their costs or disbursements.

WITNESS, The Honorable Allan Schmalenberger, Judge of the District Court, Southwest Judicial District, Stark County, North Dakota, and the hand and seal of said Court this 5th day of March, 2001.

/s/_____
Clerk of the District Court

United Court Information System STATEMENT JUDGMENT

Case # : 45-57-C-00089 Seq#: 01

FOR : EXXON CORPORATION
AGAINST : KOCH INDUSTRIES, INC.
: KOCH HYDROCARBONS

Judge Involved: 3118 ALLAN L. SCHMALENBERGERType
Transferred From :
Vacated

Damages : 307,774.50 File Date : 3/05/01
Interest : 102,723.44 Satisfied & Date :
Cost & Disbursements :
Attorney Fees : Docket Date/Time :3/06/01 7:54:25
---------- Re-docket Date/Time
Judgment Amount : 410,497.94 Date Renewed :

Settlement Amount :

BALANCE : 410,497.94 Post Jdmt Int. Rate: 12.00%
Disch by stat of Limitations? : N

*** JUDGMENT NOTES ***

JUDGMENT INTERESTED CALCULATED AT 6% OR TOTAL AMOUNT OF $96,347.84 THROUGH 10-31-2000 AND ADDITIONAL INTERESTS IN AN AMOUNT EQUAL TO $50.60 PER DAY FROM 11-1-2000 FOR A TOTAL INTEREST OF $102,723.44.

C-1

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT COURT
STATE OF NORTH DAKOTA
COUNTY OF STARK

BTA Oil Producers, Cenex, Inc.,Conoco Inc., Equitable Resources Energy Company Exxon Corporation, Midgard Energy Company, (formerly know as Maxus Exploration Company), Sinclair Oil Corporation, Sun Operating Limited Partnership, TBI Exploration, Inc. (formerly known as Presidio Exploration, Inc.), Tipperary Oil & Gas Corporation, and Tom Brown, Inc.,

Plaintiffs,

vs.

MDU Resources Group, Inc. (formerly known as Montana-Dakota Utilities Company), Williston Basin Interstate Pipeline Company, Inc., Koch Industries, Inc., and Koch Hudrocarbons Company,

Defendants.

Filed Oct 04 2000

ORDER OF JUGMENT

This case was initiated by a summons and complaint in March 1997. The Complaint was subsequently amended with leave of the Court in February 1998. The First Amended Complaint assert claims against MDU Resources Group, Inc. and Williston Basin Interstate Pipeline Company ("MDU/WBI") as well as against Koch Industries, Inc. and Koch Hydrocarbons ("Koch"). The claims asserted against MDU/WBI are for:

1. Unjust enrichment for alleged benefits received by breach of gas purchase contracts with Koch;

2. Creation of an implied trust for amounts not paid to Koch as damages for breach of the gas purchase Contracts; and

3. Civil conspiracy with Koch to allegedly deny the plaintiffs the benefits of an August 11, 1993 settlement agreement with Koch.

The First Amended Complaint asserted claims against Koch for:

1. Breach of Contract and Unjust Enrichment allegedly resulting from: (a) the August 11,1993 settlement agreement with MDU/WBI covering Koch's past damages; (b) the August 11, 1993 settlement agreement with MDU/WBI covering Koch's future damages; (c) failure to property pay the plaintiffs for natural gas; (d) improper reductions to payments made to the plaintiffs including improper calculation of treating fees charged to Exxon; and (e) failure to make proper payment for liquid hydrocarbons;

2. Constructive Fraud and Deceit for allegedly failing to keep the plaintiffs informed of developments in the litigation and settlement with MDU/WBI; and

3. Civil Conspiracy with MDU/WBI to allegedly deny the plaintiffs the benefits of the August 11, 1993 settlement agreement

MDU/WBI and Koch seek summary judgment dismissal of the claims against them with the exception of the claims asserted against Koch set forth in paragraph 39 of the First Amended Complaint regarding alleged improper treating fees charged by Koch to Exxon. In addition to summary judgment motions, the following motions are also pending before the Court:

1. Plaintiffs' Second Motion to Compel Discovery from Koch;
2. Plaintiffs' Second Motion to Compel Discovery from MDU/WBI;
3. Koch's Motion to Strike Plaintiffs' Reply Brief as untimely;
4. Plaintiffs' Third Motion to Compel Discovery from MDL/WBI;
5. Plaintiffs' Third Motion to Compel Discovery from Koch;
6. Plaintiffs' Motion to File Second Amended Complaint;
7. Plaintiffs Motion to Compel Discovery of Koch and Award Sanctions; and
8. Plaintiff.' Motion for Leave to Supplement Second Motion to Compel Discovery from Koch.

I. MOTIONS FOR SUMMARY JUDGMENT.

A. Standard of Review

Summary Judgment is a procedure for promptly and expeditiously disposing of an action without trial if either party is entitled to judgment as a matter of law if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts or if resolving the factual disputes will not alter the result. *Valkenburg v. Paracelies Healthcare Corporation* 2000 ND 38, ¶17, 606, N.W.2d 908.

If there is no genuine issue as to any material fact and the moving party Ii entitled to judgment as a matter of law, it is entitled to summary Judgment. N.D.Rciv..P. 56. In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the opposing party including giving it the benefit of all favorable inferences. Although the

party seeking the summary judgment has the burden to demonstrate no genuine issue of material fact, the Court must consider the substantive standard of proof at trial when ruling on the motion. The party resisting may not simply rely on the pleadings or unsupported, conclusionary allegations, but must present competent, admissible evidence which raises an issue of material fact and, if appropriate, draw the Court's attention to it within the record. Summary judgment is appropriate if a party fails to make a showing sufficient to establish the existence of an element essential to his party's case on which the party will bear the burden of proof at trial. *Hurt v. Freeland,* 1999 ND 12, 589 N.W. 2d 551.

B. Undisputed Material Facts.

MDU/WBI transports, distributes, and sells natural gas. Koch buys and processes natural gas. Plaintiffs are natural gas producers who sold gas to Koch. Koch processed the gas and sold it to MDU/WBI. Producer contracts with Koch did not have a fixed price for the gas. Producers received a price based, in part, on a percentage of the proceeds received by Koch when Koch sold the gas.

On December 20, 1979, when natural gas was in short supply, MDU and Koch signed a ten-year contract ("the McKenzie contract") In which MDU agreed to buy and Koch agreed to sell up to 25,000 (later change to 50,000) Mcf of residue gas per day at "the highest price permitted" by the Natural Gas Policy Act of 1975 ("NGPA").

At met, MDU bought all the gas Koch tendered. However, a surplus of gas developed and on February 1, 1983, MDU reduced the volume of its gas purchases, buying less than Koch had available. Gas not bought by MDU was sold to others or placed in storage for later sale.

MDU paid the maximum lawful price permitted by the NFPA through 1984. On January 1, 1985, the prices for certain categories of natural gas were deregulated and a dispute arose between Koch and MDU over the proper price under their contracts. That same day, MDU assigned its gas

purchase contracts to WBI, a subsidiary of MDU. After January 1. 1985, WBI paid for gas purchased in accordance with its contractual interpretation that deregulated gas was to be priced at a reasonable market price. Koch contended the last regulated price, which was higher, continued as the applicable contract price. Koch and MDU reached a partial settlement of their dispute on May 27. 1986.

After WBI and Koch were unable to reach further agreement regarding the disputes, Koch sued MDU/WBI in federal court In January 1987 for breach of contract. On May 6, 1987, WBI notified Koch that, effective May 1, 1987, it would no longer purchase gas from Koch under the contracts unless Koch agreed to an amendment. The federal district court held MDU/WBI breached its contract with Koch, but reduced Koch's claims by 75 percent, finding that, for the most part, Koch's contracts with the producers were percentage-of-proceeds contracts, with the split averaging 25 percent to Koch and 75 percent to the producers. Koch argued on appeal that the damage award should not have been reduced by 75 percent. The United States Court of Appeals for the Eighth Circuit affirmed the percentage-of-proceeds reduction in damages, reasoning the producers had not intervened and Koch should be allowed to collect only the damage. It sustained. The case was remanded to the district court for determination of damages. *Koch Hydrocarbon Co. v. MDU Resources Group. Inc.*, 988 F.2d 1529 (8th Cir. 1993). Koch and MDU then settled.

Although plaintiffs resist the defendants' motions for summary judgment and attack the credibility of the affiants who submitted affidavits in support of the motions for summary judgment, they have not submitted affidavits or other competent, admissible evidence to refute the material facts contained In the affidavits or to otherwise raise an issue of material fact.

C. **Discussion.**

a. Claim for Unjust Enrichment Against MDU/WBI.

Under a similar set of facts, the Supreme Court held in *Apache v. MDU Resources Group Inc.,* 1999 ND 247, 603 N.W. 2d 891, that WBI did not receive a benefit at the expense of plaintiff Apache and therefore was not unjustly enriched as a result of the breach and repudiation of the contracts with Koch:

Apache benefitted when MDU performed MDU's contract with Koch. Although MDU saved money by breaching its contract with Koch, and Apache received less money from Koch when MOU breached its contract with Koch, MDU contracted with Koch and not with Apache, The money MDU saved by breaching Its contract with Koch was not a "benefit at the direct expense of" Apache. *Sivertson,* 307 N.W. 2d at 557. Apache's reduced income resulted from its use of percentage of proceeds as a pricing factor in its agreements with Koch, which contemplated increases or decreases in gas prices. Where the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity. *Albrecht,* 1997 ND 238, ¶23,572 N.W. 2d 809. Thus, we are unpersuaded the essential element of recovering under a theory of unjust enrichment - "receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value" is present here.

Apache v. MDU, supra

The plaintiffs' claim of unjust enrichment against MDU/WBI in this proceeding is indistinguishable from that asserted by Apache.

Unjust enrichment is art equitable doctrine applied in the absence of an express or implied contract to prevent a person from being unjustly enriched at the expense of another. *Zuger v. North Dakota Ins. Guar. Ass'n,* 494 N.W. 2d 135, 138 (N.D. 1992). It serves as a basis for requiring restitution of

benefits conferred in the absence of an express contract. *Opp v. Matzke*, 1997 ND 32, 559 N.W. 2d 837. A determination of unjust enrichment is a conclusion of law. *Apache v. MDU Resources Group. Inc., supra* at ¶13.

Five elements must be proved to recover under a theory of unjust enrichment They are: (1) an enrichment. (2) an impoverishment; (3) a connection between the enrichment and the impoverishment (4) the absence of a justification for the enrichment or impoverishment and (5) an absence of a remedy provided by law. *Id.*

The essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value. *Id.* at ¶14. Not every receipt of a benefit, however. constitutes unjust enrichment.

MDU/WBI contracted with Koch and not with the plaintiffs. Any money saved by MDU/WBI as a result of repudiation or settlement of the contracts with Koch was not a benefit at the direct expanse of the plaintiffs. The plaintiffs' reduced income, as acknowledged by their amended complaint, resulted from their use of percentage of proceeds as a pricing factor in their agreements with Koch which contemplated Increases or decreases in prices. Accordingly, the Court concludes the essential element for a claim of unjust enrichment, the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying its value, does not exist with respect to the plaintiffs' claims against MDU/WBI.

The plaintiffs argue they were not parties to the Apache case and therefore they should not be bound to that decision under doctrines such as res judicata and collateral estoppel. The Court, however, does not grant summary judgment based on the doctrines of res judicata or collateral estoppel but rather upon the controlling precedent of *Apache*.

The plaintiffs also argue they raised issues as an amicus curiae that were not considered by the Supreme Court in

Apache. Because the material facts fail to establish the essential element for unjust enrichment. the other issues raised by the plaintiffs would not change the outcome in this case.

Finally, the plaintiffs argue that MDU/WBI should be judicially estopped from denying liability to the plaintiffs because MDU/WBI argued that Koch was not the real party in interest to assert many of the damages claimed In *Koch v. MDU, supra*. If MDU/WBI argued that Koch was not the real party in interest for some of the damages it claimed in the litigation with MDU/WBI, that argument is inconsistent with MDU/WBI's position in this litigation. As determined by the Eighth Circuit Court of Appeals, Koch's payment obligation to the producers was reduced as a result of the lower prices it received from MDU/WBI and third parties. Therefore, any monetary loss to Koch was reduced by the lower payments if made to producers. Although Koch was not the real party in interest for recovery of the producers' lost opportunity, that does not mean the producers are entitled to recover for that lost opportunity.

b. Claims for Unjust Enrichment Against Koch.

The Court also concludes that essential elements of a claim for unjust enrichment are absent from plaintiffs' claim against Koch. For the same reasons described above in connection with the unjust enrichment claim against MDL/WBI, the plaintiffs have not shown any impoverishment resulting from any actions on the part of Koch in settling the prior *Koch v. MDU* litigation. In addition, these plaintiffs cannot establish any enrichment to Koch flowing from the August 11 1993 settlement. That settlement simply effectuated the holding of the Eighth Circuit which limited Koch's recovery to 25 percent of its claimed damages. This was all that Koch in fact, recovered, and therefore, there was no enrichment.

Finally, the plaintiffs are not entitled to pursue claims on unjust enrichment against Koch because all of these plaintiffs

had direct, written contracts with Koch. In such circumstances, the quasi-contractual claim of unjust enrichment is not recognized under North Dakota law. *JN Exploration & Prod, v. Western Gas Resources, Inc.*, 153 F.3d 906, 910 (8th Circ. 1998). *Estate of Hill*, 492 N.W. 2d 288, 294-96 (N.D. 1992).

c. Claim for Implied Trust Against MDU/WBI

The plaintiffs allege MDU/WBI have not paid damages for the alleged unjust enrichment resulting from the breach of the Koch contracts. Therefore, the plaintiffs contend MDU/WBI hold the amount of such damages in an implied trust created by operation of law pursuant to N.D.C.C. § 59-01-05 and 59-01-06. Because, the Court concludes MDU/WBI were not unjustly enriched and therefore do not hold amounts attributable to damages for unjust enrichment, an implied trust for such amounts was not created by operation of law and the plaintiffs are not the beneficiaries of such a trust.

d. Claims for Breach of Contract Against Koch.

The plaintiffs allege five separate acts giving rise to beach of contract claims against Koch. Koch has not moved as to one of those allegations (paragraph 39 of the First Amended Complaint alleging Improper treating fee charge to Exxon), and the plaintiffs have voluntarily agreed not to pursue one of those allegations (paragraph 38 of the First Amended Complaint alleging Improper payments to plaintiffs for residue gas disposed of by Koch). Two of the remaining claims for breach of contract concern the terms of the August 11, 1993 settlement agreement Koch reached with MDU/WBI, and the final remaining claim alleges possible improper payments to the plaintiffs for natural gas liquids processed by Koch.

The two remaining claims for breach of contract based upon the August 11, 1993 settlement agreement must be dismissed because the plaintiffs cannot establish that Koch's agreement to settle the *Koch v. MDU* on the terms agreed to

constituted a breach of any contractual term or contractual obligation Koch had with any producer plaintiff. Koch's 1993 settlement with MDU/WBI simply gave effect to the Eighth Circuit's ruling that Koch was entitled to recover against MDU/WBI for Koch's damages sustained as a result of MDU/WBI's breaches of contracts it had with Koch. These plaintiffs can establish no contractual entitlement to any part of that settlement amount.

As for the plaintiffs' remaining breach of contract claim, that for alleged under-payments for natural gas liquids, the applicable paragraph 40 of the First Amended Complaint fails to Specify precisely what plaintiffs were under-paid and what specific contractual terms Koch was alleged to have breached. Although the plaintiffs had sufficient opportunity to develop these claims, at the time Koch moved for summary judgment, the plaintiffs still could not articulate which plaintiffs, under which contracts and for what time periods or amounts had valid claims for liquids under-payments against Koch.

e. Fraud Claim Against Koch.

The plaintiffs have alleged and sought to prove that Koch failed to apprise the plaintiff. of the development. in the *Koch v. MDU litigation.*. As a result, these plaintiffs alleged that they did not initiate their complaint against MDU/WBl sooner than March 1997. However, the time when the claims were initiated against MDU/WBI is not a factor in the dismissal of all claims against MDUI/WBI. These plaintiffs simply have no viable claims against MDU/WBI. Nothing that Koch allegedly said or failed to say about the *Koch v. MDU* litigation to these plaintiffs effected the value of their claims against MDU/WBI. Therefore, there was no detrimental reliance of these plaintiffs on Koch's statements or lack thereof. The fraud claims against Koch are subject to summary judgment.

f. Civil Conspiracy Claim Against MDI/WBI and Koch.

The plaintiffs alleged MDU/WBI and Koch conspired that Koch would withhold information from the plaintiffs regarding the 1993 settlement agreement between MDU/WBI and Koch. The plaintiffs further contend that Koch's failure to provide such information caused the plaintiffs to delay filing their unjust enrichment claims against MDU/WBI thereby missing the statute of limitations. MDU/WBI and Koch moved for summary judgment dismissal of the civil conspiracy claim contending there are no facts supporting the claim.

Civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act or to commit a lawful act by unlawful means. *Hurt v. Freeland*, 1999 ND 12, 589 N.W. 2d 551. The principal elements of civil conspiracy are: (1) an agreement between the parties to inflict a wrong against or injury upon another; and (2) an overt act that results in damages. *Estate of Wenzel - Masset by Gaukler v. Nickel*, 1998 ND TB. ¶26, 575 N.W. 2d 425, 432. For a conspiracy to exist there must be an underlying tort which the alleged conspirators agreed to commit. *North Dakota Personal Injury Asbestos* Litigation No.1, 737 F.Supp. 1087 (DND 1990). One of the parties must then commit some tortious act in pursuance of the agreement. Absent a tortious act, there can be no conspiracy. *Estate of Wenzel - Masset, supra* at ¶18-19.

The plaintiffs allege the tort supporting their civil conspiracy claim was Koch's failure to keep the plaintiffs fully informed of major developments in its lawsuit against MDU/WBI and the subsequent settlement of that litigation.

In response to the motions for summary judgment, the plaintiffs Cenex, Conoco, Equitable and Midgard determined not to pursue the conspiracy claim. The remaining plaintiffs initially resisted the motions and in the alternative requested the Court for a continuance to provide them with an opportunity to complete discovery. The Court granted the

plaintiffs until April 15, 2000 to complete any additional discovery and to file any additional response to the motions for summery judgment. file their supple mental response to the summary judgment motions, the plaintiffs stated their intent to amend their complaint and remove this allegation of civil conspiracy.

The plaintiffs failed to present competent, admissible evidence which raises an issue of material fact to support this claim of civil conspiracy. Moreover, the Court has determined as a matter of law the plaintiffs did not have a valid claim against MDU/WBI. In the absence of damages resulting from the alleged conspiracy, the claim must be dismissed.

II. PLAINTIFFS' MOTION FOR LEAVE TO PILE A SECOND AMENDED COMPLAINT.

The plaintiffs seek leave of the Court to tile a second amended complaint The plaintiffs outlined the substantive changes of the amended complaint as follows:

1. The amendment corrects the identities of the plaintiffs and their addresses some of which have merged, been acquired, or changed addresses.

2. The amendment deletes the allegations that Koch did not properly pay the plaintiffs for their gas based on the residue prices received by Koch and the allegations that the defendants conspired to conceal the settlement from the plaintiffs.

3. The amendment alleges breach by Koch of a "special relationship" with the plaintiffs by failing to keep the plaintiffs informed of the litigation and settlement with MDU/WBI and refusing to share the settlement proceeds with the plaintiff.

4. The amendment alleges breach of contract by Koch for failing to keep the plaintiffs informed of the litigation and settlement with MDU/WBI causing the plaintiffs not to intervene in the litigation and recover against MDU/WBI.

5. The amendment alleges tortious interference with contract by MDU/WBI through Its settlement agreement with Koch which proved that the settlement payments were calculated by giving effect to the order of the Federal District Court in the *Koch* litigation and by resolving the remanded issues.

6. The amendment alleges a civil conspiracy by Koch and MCU/WBI through the structuring of their Settlement Agreement in a manner that benefitted themselves to the detriment of the plaintiffs and other affected parties.

Rule 15(a), ND.R.Civ.P, allows a party to amend its pleadings after a responsive pleading has been served "only by leave of the court, . . and leave shall be freely given when justice so requires." *Messiha v. State* 583 N.W. 2d 385, 387 (N.D. 1998). Grounds to deny leave to amend include: undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, and futility of the amendment. *Forman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

The defendants do not object to the plaintiffs' amendment to correct the identities and addresses of the plaintiffs. Changes In corporate identity or address occurring since the date of the First Amended Complaint are property reflected in a supplemental pleading pursuant to Rule 15(d), N.D.R.Civ.P. Leave is grunted for the plaintiffs to file a supplemental amended complaint reflecting any changes in the identities and addressee of the plaintiffs. The defendants are not required to answer the supplemental amended complaint.

The Court has granted summary Judgment dismissal of the plaintiffs' claim that the defendants conspired to conceal the settlement agreement. Amendment of the complaint to delete this claim is moot.

The plaintiffs' proposed amendment to add an allegation against Koch for breach of a special relationship would be futile. As discussed above in connection with the plaintiffs'

fraud claim against Koch, nothing that Koch allegedly said or failed to say to the plaintiffs caused these plaintiffs any harm. Since these plaintiffs had no viable claims against MDU/WBI, the time when this suit was initiated - presumably based upon things that the plaintiffs learned about the *Koch v. MDU* litigation - simply did not matter. In addition, the plaintiffs could not establish as a matter of law that, as producers, they were owed "special relationship" duties by Koch, a gas processor. *See,Bourgois v. Montana Dakota Utilities Co.* 466 N.W. 2d 813, 619 (N.D. 1991) ("special relationship does not ordinarily exist when business persons deal with each other at arm's length").

The plaintiffs' proposed amendments to their breach of contract claims are also futile. The plaintiffs' intervention in the underlying *Koch v. MDU* case would not have created a cause of action against MDU/WBI since the *Apache* court has made clear that no such claims exist by the producers behind Koch's plant against MDU/WBI.

The proposed claim for tortious interference with contract by MDU/WBI is not based upon new facts but rather is only a new theory. The plaintiffs have not provided an explanation for their failure to originally develop this claim and to add the claim at this time would prejudice MDU/WBI. In order to establish a prima facie case of tortious interference with contractual relations, the plaintiffs must show: (1) a contract existed; (2) the contract was breached; (3) MDU/WBI instigated the breach; and (4) MDU/WBI did so without justification. *Tracy v. Central Case Public School District* 1998 ND 12, 574 N.W. 2d 781; *Bismarck Realty Company v. Foldan*, 354 N.W. 2d 636 (N.D. 1984). The plaintiffs allege Koch breached its percentage of proceeds contracts with the plaintiff by not sharing settlement payments with the plaintiffs. The plaintiffs, however, have not shown they were entitled to a share of the settlement payments resulting from a breach or termination of the contracts between Koch and MDU/WBI and the Court has grunted summary judgment dismissing the plaintiffs' claims for

breach of contract based on Koch's failure to share settlement payments. Moreover, the plaintiffs have not alleged or presented any facts that MDU/WBI directed or suggested to Koch to withhold settlement proceeds from the plaintiffs. Rather, the plaintiffs allege that Koch refuses to share the settlement proceeds because the payments were based upon the holding in the *Koch v. MDU*, litigation that Koch was only entitled to recover its damages. Allegations that MDU/WBI settled litigation with Koch based upon filings of the federal trial and appellate courts cannot be the basis for a claim of tortious interference with contracts between Koch and the. plaintiffs. Because amendment of the complaint to assert a claim for tortious interference with contract would prejudice MDU/WBI and because the plaintiffs failed to show a breach of contract between the plaintiffs and Koch or that MDU/WBI instigated such a breach, the plaintiffs' motion for leave to file an amended complaint asserting a claim for tortious interference with contract is denied.

The plaintiffs proposed new claim of civil conspiracy is also not based upon new facts but rather is only a new theory. As with their other proposed claims the plaintiffs have not provided an explanation for their failure to originally develop this claim and to add the claim at this time would prejudice the defendants. The plaintiffs seek to assert a new claim of civil conspiracy because the allocation of the settlement payment impaired the plaintiffs claim to sham in the payment while allegedly allowing MDU/WBI to recover more of the settlement payment than would otherwise be possible from its customers and ratepayers. The plaintiffs do not have standing in this proceeding to allege that the allocation of the settlement payment somehow disadvantaged MDU/WBI's customers and ratepayers. The plaintiff.' civil conspiracy claim is also futile to the extent it alleges Koch and MDU/WBI conspired in the allocation of the settlement payment to impair the plaintiffs' claim to share in the payment. The plaintiffs allege that Koch has not shared any of the settlement proceeds with the plaintiffs. Accordingly, by the plaintiffs' own assertions, the allocation of the settlement

payment within the settlement agreement had no effect on the plaintiffs because Koch shared none of the proceeds from any of the settlement allocation categories. Because amendment of the complaint to assert a new claim of civil conspiracy at this stage of the proceeding would prejudice the defendants and because the plaintiffs have not shown they would have received any of the settlement proceeds regardless of how allocated, the plaintiffs' motion for leave to amend to assert a new claim of civil conspiracy is denied.

III. DISCOVERY MOTIONS.

The plaintiffs filed two motions to compel discovery from MDU/WBI. By these motions (styled Plaintiffs' Second and Third Motions to Compel from MDU) the plaintiffs seek to compel responses to requests for admissions and Interrogatories. The plaintiffs state the discovery requests focus on whether MDU/WBI admit that Judge Conmy's and the Eighth Circuit's determinations are correct, accurate, and binding on MDU for purposes of this lawsuit as to determine to what extent the parties will have to relitigate issues that were decided by Judge Conmy and the Eighth Circuit. Because the Court has granted summary judgment dismissing the plaintiffs' claims against MDU/WBI, further discovery regarding those claims is moot. The plaintiffs' motions to compel further discovery of MDUJWBI is denied.

The plaintiffs bring similar motions to compel against Koch to admit or deny allegations made by the decisions in *Koch v. MDU* litigation. For the same reasons that the motions against MDU/WBI are denied, these motions against Koch are denied. Finally, the plaintiffs seek additional discovery from Koch in connection with the natural gas liquids claim against Koch. Because these plaintiffs delayed two years in pursuing this discovery and because these plaintiffs fail to articular which of them are even pursuing such claims, the remaining motions to compel against Koch are denied.

Koch's Motion to Strike Plaintiffs' Reply Brief in support of the Second Motion to Compel Discovery from Koch is denied as moot.

IV. CONCLUSION.

The Court's Order disposes of all claims and other pending matters against the defendants MDU/WBI. The Order disposes of all the claims and other pending matters by all the plaintiff against the defendant Koch with the exception of Plaintiff Exxon's treating fee claim set forth in paragraph 39. The treating fee claim by Exxon is unrelated and its outcome unaffected by the other claims which are dismissed by this Order. The Court expressly determines under Rule 54(b). N.D.RCiv.P., that there is no just reason for delay in entering final judgment on the plaintiffs' First Amended Complaint with the exception of the Plaintiff Exxon's treating fee claim against the defendant Koch, contained in paragraph 39.

The Clerk is hereby ordered to enter final judgment in accordance with this order dismissing all claims against MDU/WBI and all claims against Koch with the exception of the treating fee claim set forth in paragraph 39 of the First Amended Complaint.

Trial is set on paragraph 39 of the First Amended Complaint for October 23-24, 2000.

Dated this 4 day of October, 2000

BY THE COURT

/s/ _____
Allan Schmalenberger
District Judge

D-1

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT COURT
STATE OF NORTH DAKOTA
COUNTY OF STARK

BTA Oil Producers, Cenex, Inc.,Conoco Inc., Equitable Resources Energy Company Exxon Corporation, Midgard Energy Company, (formerly know as Maxus Exploration Company), Sinclair Oil Corporation, Sun Operating Limited Partnership, TBI Exploration, Inc. (formerly known as Presidio Exploration, Inc.), Tipperary Oil & Gas Corporation, and Tom Brown, Inc.,

Plaintiffs,

vs.

MDU Resources Group, Inc. (formerly known as Montana-Dakota Utilities Company), Williston Basin Interstate Pipeline Company, Inc., Koch Industries, Inc., and Koch Hydrocarbons Company,

Defendants.

Case No. 97C-89

MEMORANDUM

The defendants, MDU Resource Group, Inc., Williston Basin Interstate Pipeline Co., Koch Industries, Inc., and Koch Hydrocarbons Company, seek the entry of a summary judgment dismissing all of the plaintiffs' claims except for the claims against Koch set forth in paragraph 49 of the first amended complaint. The plaintiffs resist. The Court grants the motion for summary judgment.

UNDISPUTED MATERIAL FACTS

MDU transports, distributes, and sells natural gas. Koch buys and processes natural gas. The plaintiffs are natural gas producers who sold gas to Koch, which processed it and sold it to MDU. Producer contracts with Koch did not have a fixed price for the gas. Producers received a price based, in part, on a percentage of the proceeds received by Koch when Koch sold the gas.

On December 20, 1979, when natural gas was in short supply, MDU and Koch signed a ten-year contract ("the McKenzie contract") in which MDU agreed to buy and Koch agreed to sell up to 25,000 (later changed to 50,000) Mcf of residue gas per day at "the highest price permitted" by the Natural Gas Policy Act of 1978 ("NGPA")

At first, MDU bought all the gas Koch tendered. However, a surplus of gas developed, and, on February 1, 1983, MDU reduced the volume of its gas purchases, buying less than Koch had available. Gas not bought by MDU was sold to others or placed in storage for later sale.

MDU paid the maximum lawful price permitted by the NGPA through 1984. On January 1, 1985, the prices for certain categories of natural gas were deregulated and a dispute arose between Koch and MDU over the proper price under their contracts. That same day, MDU assigned its gas purchase contracts to Williston Basin Interstate Pipeline Company, a subsidiary of MDU Resources Groups, Inc. After January 1, 1985, WBI paid for gas purchased in accordance with its contractual interpretation that deregulated gas was to be priced at a reasonable market price. Koch contended the last regulated prices, which was higher, continued as the applicable contract price. Koch and MDU reached a partial settlement of their dispute on May 27, 1986.

After WBI and Koch were unable to reach further agreement regarding the disputes Koch sued MDU and WBI in federal court in January 1987 for breach of contract. On

May 6, 1987, WBI notified Koch that, effective May 1, 1987, it would no longer purchase gas from Koch under the contracts unless Koch agreed to an amendment. The federal district court held MDU had breached its contract with Koch, but reduced Koch's claims by 75%, finding that, for the most part, Koch's contracts with the producers were percentage-of-proceeds contracts, with the split averaging 25% to Koch and 75% to the producers. Koch argued on appeal that the damage award should not have been reduced by 75%. The United States Court of Appeals for the Eighth Circuit affirmed the percentage-of-proceeds reduction in damages, reasoning the producers had not intervened and Koch should be allowed to collect only the damages it sustained. The cases was remanded to district court for a determination of damages. *Koch Hydrocarbon Co. v. MDU Resources Group, Inc.*, 988 F.2d 1529 (8th Circ. 1993). Koch and MDU then settled.

DISCUSSION

If there is no genuine issue as to any material facts and the moving party is entitled to judgment as a matter of law, they are entitled to a summary judgment. N.D.R. Civ. P. 56. In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the opposing party including giving them the benefit of all favorable inferences. Although the party seeking the summary judgment has the burden to demonstrate no genuine issue of material fact, the Court must consider the substantive standard of proof at trial when ruling on the motion. Thus, the party resisting may not simply rely on the pleadings or unsupported, conclusionary allegations, but must present competent, admissible evidence which raises an issue of material fact and, if appropriate, draw the Court's attention to it within the record. Summary judgment is appropriate if a party fails to make a showing sufficient to establish the existence of an element essential to the party's case on which the party will bear the burden of proof at trial. *Hurt v. Freeland*, 1999 ND 12, 589 N.W. 2d 551.

This case reaches the trial court in an unusual posture because of the companion case of *Apache, et al v. MDU Resources Group, et al*, 1999 ND 247, 603 N.W. 2d 891, was recently decided by the North Dakota Supreme Court. The uncontested facts in this case and *Apache* are the same. Therefore, this Court has the guidance and precedent of the North Dakota Supreme Court and the decision of District Judge McLees in making its determination. On these undisputed facts, it was determine the gas producers were not third-party beneficiaries entitled to enforce MDU's contract with Koch, there was no unjust enrichment claim against MDU, and there was no constructive trust. If there is no basis for the gas producers to collect from MDU, there can be no basis for them to collect from Koch.

CONCLUSION

Therefore, except for the claim against Koch set forth in paragraph 49 of the first amended complaint, the motions for summary judgment are granted. The Court directs MDU's counsel to consult with Koch's counsel and prepare a proposed order. From the date of service, the plaintiffs shall have 20 days to file any response in writing to the proposed order.

In light of the Court granting the motion for judgment, the Court denies the remaining motions, but the plaintiffs may resubmit any motions they feel were not disposed of or made moot because of this ruling.

Dated: July 3, 2000.

BY THE COURT

/s/_____
Allan Schmalenberger
District Judge

E-1

No. 990143

SUPREME COURT OF NORTH DAKOTA

Apache Corporation and Snyder Oil Corporation, now named Santa Fe Snyder Corporation,
Plaintiffs and Appellants

v.

MDU Resources Group, Inc. (formerly known as Montana-Dakota Utilities Company), and Williston Basin Interstate Pipeline Company, Inc.,
Defendants and Appellees

December 28, 1999, Filed

Appeal from the District Court of McKenzie County, Northwest Judicial District, the Honorable William W. McLees, Judge.

COUNSEL:

Fred C. Rathert, Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L., Williston, N.D., for plaintiffs and appellants.

Daniel S. Kuntz, Zuger Kirmis & Smith, Bismarck, N.D., for defendants and appellees. Appearance by James S. Hill.

Albert J. Hardy, Dickinson, N.D., for amicus curiae.

JUDGES:

Opinion of the Court by Kapsner, Justice. Carol Ronning Kapsner, Acting C.J., Dale V. Sandstrom, William A. Neumann, Mary Muehlen Maring, Gordon O. Hoberg, S.J. Gordon O. Hoberg, S.J., sitting in place of Gerald W. VandeWalle, C.J., disqualified.

OPINION BY:
KAPSNER

OPINION:
Kapsner, Justice.

Apache Corporation and Snyder Oil Corporation appealed a judgment dismissing their action against MDU Resources Group, Inc., and Williston Basin Interstate Pipeline Company, Inc. We conclude Apache Corporation and Snyder Oil Corporation did not show they were third-party beneficiaries of other parties' contracts or show unjust enrichment, and we affirm.

Montana-Dakota Utilities Company (known as MDU Resources Group, Inc., since January 1, 1985, "MDU") transports, distributes, and sells natural gas. Koch Hydrocarbon Company ("Koch") buys and processes natural gas. Apache Corporation and Snyder Oil Corporation are natural gas producers who sold gas to Koch, which processed it and sold it to MDU. Producer contracts with Koch did not have a fixed price for the gas. Producers received a price based, in part, on a percentage of the proceeds received by Koch when Koch sold the gas.

On December 20, 1979, when natural gas was in short supply, MDU and Koch signed a ten-year contract ("the McKenzie contract") in which MDU agreed to buy and Koch agreed to sell up to 25,000 (later changed to 50,000) Mcf of residue gas per day at "the highest price permitted" by the Natural Gas Policy Act of 1978 ("NGPA"). The contract did not require Koch to deliver any minimum quantity to MDU and allowed Koch to terminate the contract at any time upon 180 days notice to MDU. Koch and MDU later made a similar agreement for gas produced in another field.

At first, MDU bought all the gas Koch tendered. However, a surplus of gas developed, and, on February 1, 1983, MDU reduced the volume of its gas purchases, buying less than Koch had available. Gas not bought by MDU was sold to others or placed in storage for later sale.

MDU paid the maximum lawful price permitted by the NGPA through 1984. On January 1, 1985, the prices for certain categories of natural gas were deregulated and a dispute arose between Koch and MDU over the proper price under their contracts. That same day, MDU assigned its gas purchase contracts to Williston-Basin Interstate Pipeline Company ("WBI"), a subsidiary of MDU Resources Group, Inc. After January 1, 1985, WBI paid for gas purchased in accordance with its contractual interpretation that deregulated gas was to be priced at a reasonable market price. Koch contended the last regulated price, which was higher, continued as the applicable contract price. Koch and MDU reached a partial settlement of their dispute on May 27, 1986.

In January 1987, Koch sued MDU and WBI in federal court for breach of contract. On May 6, 1987, WBI notified Koch that, effective May 1, 1987, it would no longer purchase gas from Koch under the contracts unless Koch agreed to an amendment. The federal district court held MDU had breached its contract with Koch, but reduced Koch's damage claim by 75%, finding that, for the most part, Koch's contracts with the producers were percentage-of-proceeds contracts, with the split averaging 25% to Koch and 75% to the producers. Koch argued on appeal that the damage award should not have been reduced by 75%. The United States Court of Appeals for the Eighth Circuit affirmed the percentage-of-proceeds reduction in damages, reasoning the producers had not intervened and Koch should be allowed to collect only the damages it sustained.

The case was remanded to district court for a determination of damages. Koch Hydrocarbon Co. v. MDU Resources Group, Inc., 988 F.2d 1529 (8 Cir. 1993). Koch and MDU then settled.

Apache Corporation and Snyder Oil Corporation (collectively referred to as "Apache") sued MDU and WBI (collectively referred to as "MDU") in December 1993, to recover the money MDU did not pay Koch after breaching its contracts with Koch, alleging Apache was a third-party

beneficiary of the contracts between MDU and Koch, MDU was unjustly enriched by its repudiation or default of the MDU contracts with Koch, and MDU holds the damages due Apache in an implied trust. The district court ruled N.D.C.C. § 41-02-104, rather than N.D.C.C. § 28-01-16, is the statute of limitations applicable to Apache's claims; Apache was not an intended third-party beneficiary of MDU's contracts with Koch; MDU was not unjustly enriched; and there was no evidence establishing a constructive trust. The court ordered dismissal of all of Apache's claims.

Judgment was entered accordingly, and Apache appealed.[1]

Apache contends the trial court erred in concluding Apache was not a third-party beneficiary of MDU's contracts with Koch.

Apache can enforce the MDU-Koch contracts "as a third-party beneficiary if it falls within the ambit of Section 9-02-04, N.D.C.C., which provides: 'A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.'" *First Fed. Sav. & Loan Ass'n v. Compass Invs., Inc.*, 342 N.W.2d 214, 218 (N.D. 1983). To enforce a contract between two others, a third

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[1] BTA Oil Producers, Cenex Harvest States Cooperatives, Conoco Inc., Exxon Corporation, Sinclair Oil Corporation, Sun Operating Limited Partnership, and Tipperary Oil & Gas Corporation moved under N.D.R.App.P. 29 for leave to participate in this appeal by filing an *amicus curiae* brief and participating in oral argument. Leave was granted to file an *amicus curiae* brief. MDU brought a motion to strike portions of the *amicus curiae* brief asserting it raised new issues. We deferred ruling on MDU's motion until after oral argument, noting that should the Court decide to consider issues not raised by Appellants or Appellees, the Court would permit supplemental briefing by the parties on those issues. We consider the *amicus curiae* brief only to the extent it presents argument on issues raised by Apache. *See* 20A Moore's Federal Practice § 329.11 (3d ed. 1999) and 4 Am.Jur.2d *Amicus Curiae* § 7 (2d ed. 1995), which recognize an *amicus curiae* ordinarily cannot raise issues not presented by the parties.

party must have been intended by the contracting parties to be benefited by the contract. *Id.* Merely because a third party may derive a benefit, purely incidental and not contemplated by the contracting parties, from the performance of a contract does not entitle him to sue to enforce the contract. *Id.* See also *Hellman v. Thiele*, 413 N.W.2d 321, 325 (N.D. 1987) (Under N.D.C.C. § 9-02-04, "a party only incidentally benefited by performance of a contract is not entitled to maintain an action to enforce it."); *Johnson v. Clark*, 39 N.W.2d 431, 432 (N.D. 1949) ("The mere fact that one not a party to a contract may be benefited by its performance is not sufficient to enable him to maintain an action for its breach.").

The trial court found: 1) "Both MDU and Koch entered into their gas purchase contracts to further their own business purposes"; 2) "MDU did not know who owned the casinghead gas acquired by Koch"; 3) "Neither Koch nor MDU generally disclosed the terms of their contracts to Koch's suppliers"; 4) "Parties to a natural gas sales contract customarily did not intend to create third party beneficiaries to their contract even when the seller acquired the gas from producers under a percentage of proceeds contract"; and 5) "Koch controlled the price and payment arrangements with its suppliers under contracts that were separate and independent from the McKenzie Contract." As the trial court recognized, the McKenzie contract did not mention Apache,[2] did not require Koch to deliver any minimum quantity of gas to MDU, and provided "Koch had the unilateral right to terminate the McKenzie Contract if it deemed the operation of its processing facility and gathering system uneconomic." The evidence does not show MDU and Koch contracted "expressly for the benefit of" Apache, *see N.D.C.C.* § 9-02-04, and we conclude the trial court did not err in concluding

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[2] We have held, however, even "the mention of one's name in an agreement does not give rise to a right to sue for enforcement of the agreement where that person is only incidentally benefited." *First Fed. Sav. & Loan Ass'n v. Compass Invs., Inc.*, 342 N.W.2d 214, 218 (N.D. 1983).

Apache was not a third-party beneficiary of MDU's contracts with Koch.

Apache contends the trial court erred in concluding Apache did not prove its unjust enrichment claim against MDU.

"Unjust enrichment is an equitable doctrine, applied in the absence of an express or implied contract, to prevent a person from being unjustly enriched at the expense of another." *Zuger v. North Dakota Ins. Guar. Ass'n*, 494 N.W.2d 135, 138 (N.D. 1992).

A determination of unjust enrichment is a conclusion of law, *Matter of Estate of Zent*, 459 N.W.2d 795, 798 (N.D. 1990), and is fully reviewable by this court, *Opp v. Matzke*, 1997 ND 32, P8, 559 N.W.2d 837. There are five elements necessary to proving unjust enrichment: "1. An enrichment; 2. An impoverishment; 3. A connection between the enrichment and the impoverishment; 4. Absence of a justification for the enrichment and impoverishment; and 5. An absence of a remedy provided by law." *Opp v. Matzke*, P 8, quoting *A & A Metal Bldgs. v. I-S, Inc.*, 274 N.W.2d 183, 189 (N.D. 1978).

Abrecht v. Walter, 1997 ND 238, P23, 572 N.W.2d 809.

The doctrine of unjust enrichment "is invoked 'when a person has and retains money or benefits which in justice and equity belong to another.'" *Midland Diesel Svc. & Engine Co. v. Sivertson*, 307 N.W.2d 555, 557 (N.D. 1981) (quoting *Schlichenmayer v. Luithle*, 221 N.W.2d 77, 83 (N.D. 1974)). "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1. For a complainant to recover, it is sufficient if another "has, without justification, obtained a benefit at the direct expense of the [complainant], who then has no legal means of retrieving it." *Sivertson*, 307 N.W.2d at 557. "The essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain

without paying for its value." *Zuger v. North Dakota Ins. Guar. Ass'n*, 494 N.W.2d 135, 138 (N.D. 1992).

Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.

Comment c., Restatement of Restitution § 1. "All of us benefit constantly from efforts of others." Dan B. Dobbs, Law of Remedies § 4.1(2), p. 374 (2d ed. 1993).

In more complicated transactions involving three parties, A may contract with B but not with C, although the three are involved in a single project. The parties could have contracted each with both others, but they did not. The separate contracts convey clearly the limited kinds of liability and exposure each party has in mind. Each party may benefit by the work or payments of both other parties, but the parties understand that their responsibilities and rights are only those set up by the contract. Respect for that contract arrangement requires the courts to refuse restitution between the parties who did not contract with each other.

Dobbs, § 4.9(4) at p. 482.

Apache benefited when MDU performed MDU's contract with Koch. Although MDU saved money by breaching its contract with Koch, and Apache received less money from Koch when MDU breached its contract with Koch, MDU contracted with Koch and not with Apache. The money MDU saved by breaching its contract with Koch was not a "benefit at the direct expense of" Apache. *Siverson*, 307 N.W.2d at 557. Apache's reduced income resulted from its use of a percentage of proceeds as a pricing factor in its agreements with Koch, which contemplated increases or decreases in gas prices. Where the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity. *Albrecht*, 1997 ND 238, P23, 572 N.W.2d 809. Thus, we are unpersuaded the essential element of recovering under a theory of unjust enrichment --

"receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value" -- is present here. *Zuger*, 494 N.W.2d at 138. We conclude the trial court did not err in concluding Apache did not prove its unjust enrichment claim against MDU.

III

We have determined the trial court did not err in concluding Apache was not a third-party beneficiary entitled to enforce MDU's contract with Koch, and did not err in concluding Apache failed to prove its unjust enrichment claim against MDU. We also conclude the trial court correctly determined there was no evidence to establish a constructive trust. Because of those conclusions, we need not address the statute of limitations issues raised by Apache. We need not address questions, the answers to which are unnecessary to the determination of an appeal. *State v. Evans*, 1999 ND 70, P17, 593 N.W.2d 336.

IV

The judgment is affirmed.
Carol Ronning Kapsner, Acting C.J.
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
Gordon O. Hoberg, S.J.
Gordon O. Hoberg, S.J., sitting in place of Gerald W. VandeWalle, C.J., disqualified.

F-1

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
ORDER ON PETITION FOR REHEARING
Supreme Court No. 20010122

Appeal from the District Court for Stark County.

BTA Oil Producers, Cenex Harvest States Cooperatives, Conoco, Inc., Equitable Resources Energy Company, Exxon Mobil Corporation, Midgard Energy Company, (formerly known as Maxus Exploration Company), Sinclair Oil Corporation, Kerr-McGee Oil & Gas Onshore, L.P., TBI Exploration, Inc., (formerly known as Presidio Exploration, Inc.), Tipperary Oil & Gas Corporation, and Tom Brown, Inc.,

Plaintiffs and Appellants

v.

MDU Resources Group, Inc., (formerly know as Montana-Dakota Utilities Company), Williston Basin Interstate Pipeline Company, Inc., Koch Industries, Inc., and Koch Hydrocarbons Company,

Defendants and Appellees

This appeal having been heard by the Court at the December 2001 Term and an opinion having been filed on April 16, 2002, by:

Acting Chief William A. Neumann, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring, Justice Carol Ronning Kapsner, and Surrogate Judge Gerald G. Glaser, sitting in place of Chief Justice Gerald W. VandWalle, disqualified;

And a petition for rehearing having been filed by Albert J. Hardy and James B. Wilcox, Jr., counsel for the Appellants BTA Oil Producers, Cenex Harvest States Cooperatives, Conoco, Inc., Equitable Resources Energy Company, Exxon Mobil Corporation, Midgard Energy Company, (formerly known as Maxus Exploration Company), Sinclair Oil Corporation, Kerr-McGee Oil & Gas Onshore, L.P., TBI Exploration, Inc. (formerly known as Presidio Exploration, Inc.), Tipperary Oil & Gas Corporation, and Tom

Brown, Inc., and the Court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby DENIED.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: May 17, 2002

By the Court:

William A. Neumann
Acting Chief Justice
North Dakota Supreme Court

Attest: Penny Miller
Clerk of the Supreme Court

STATE OF NORTH DAKOTA

IN THE SUPREME COURT,

The petition for rehearing upon the appeal in the above entitled action is hereby DENIED.

Dale V. Sandstrom
Carol Ronning Kapsner
Gerald G. Glaser, S.J.
William A. Neumann, Acting C.J.

Judges, Supreme Court, State of North Dakota

I would grant the Petition for Rehearing on part IV of the Petition
Mary Muhelen Maring

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20010122

BTA OIL PRODUCERS, et al.

Appellants

vs.

MDU RESOURCES GROUP, INC, et al.

Appellees

Appeal from Judgment of Stark County
District Court, Southwest Judicial District
The Honorable Allan Schmalenberger, Presiding

PETITION FOR REHEARING OF APPELLANTS BTA OIL PRODUCERS, et al,

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Pursuant to Rule 40, Appellants other than Cenex Harvest States Cooperative ("BTA") hereby file a Petition for Rehearing of the April 16, 2002 decision.

BTA agrees with the Court's statement that on summary judgment it should "review the evidence in the light most favorable to the party opposing the motion, and give that party the benefit of all favorable inferences that can reasonably be drawn from the evidence." *See* slip Op. at 4. However, BTA respectfully disagrees that this Court correctly affirmed most of the trial court's decision in accordance with this standard. Because of page limitations, BTA is limiting this Petition to four main issues.

I. THE COURT'S DECISION VIOLATES THE U.S. CONSTITUTION.

First, the Court affirmed summary judgment on BTA's unjust enrichment claims against Montana-Dakota Resources Group, Inc. and Williston Basin Interstate Pipeline Co. ("MDU"). The significance is that MDU is being permitted to retain millions of dollars representing approximately 75 percent of the damages attributable to its admitted breaches of contract, and BTA, which is among the gas producers that incurred the resulting economic losses, recovers nothing. BTA established in its Initial Brief that this is inconsistent with the Restatement of Restitution, Dobbs on Remedies, and the general principles of restitution and unjust enrichment. MDU has its principal place of business in North Dakota and is the primary utility in the state, while none of the Appellants comprising BTA is either incorporated in or has its principal place of business in the state. BTA respectfully submits that by its decision affirming the trial court, this Court has denied BTA equal protection of law and due process of law as afforded under Section 1 of the Fourteenth Amendment to the U.S. Constitution.

II. BTA WAS DAMAGED BY KOCH'S FAILURE TO KEEP IT APPRISED OF "MAJOR DEVELOPMENTS."

Second, this Court affirmed the trial court's grant of summary judgment on BTA's claims that Koch breached its contracts by failing to apprise it of "major developments" in *Koch v. MDU*, 988 F.2d 1529 (8th Cir. 1993), on the ground that BTA had not shown that it was damaged. *Id* at 10. This Court subsequently found that:

> BTA's entire argument is premised upon its belief it could have recovered damages from MDU had it learned earlier of the federal court's ruling. In *Apache* and this case, however, we have held the producers had no valid claim for damages against MDU.

Id at 10. BTA respectfully submits that these determinations are incorrect. BTA explained at page 28 of its Initial Brief that even if it could not have successfully pursued claims against MDU under *Apache Corp. v. MDU Resources Group, Inc.* 1999 ND 247, 603 N.W.2d 891, if Koch had kept it apprised of "major developments," it would have intervened and taken other actions to protect its interests. Specifically:

1. By making a better record regarding whether MDU should only have been required to disgorge 25% of the damages;

2. By authorizing Koch to act as its agent to recover its share of damages;

3. By filing a motion under Rule 60, seeking relief from the decision that MDU should have only disgorged 25%; and

4. As parties to *Koch v. MDU*, by objecting to and defeating the settlement between Koch and MDU, under which Koch's contracts to resell its gas to MDU were bought out, and BTA received nothing.

Summary judgment can only be affirmed if this Court can properly determine that BTA would have been unsuccessful in taking each of these four actions, and BTA respectfully submits that these determinations cannot properly be made, and are indeed contrary to, the inferences required to be given to a party opposing summary judgment. The Eighth Circuit specifically stated in *Koch v. MDU* that, "The other producers did not intervene in Koch's suit, and Koch should be allowed to collect only the damages it sustained." It is a reasonable inference, therefore, that if Koch had apprised BTA of "major developments," BTA would have intervened and recovered either on the basis of a stronger record or because it would have authorized Koch to recover with respect to its interests. 1 and 2, above.

Alternatively, BTA could have intervened and filed a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60. It is equivalent to North Dakota Rule of Civil Procedure 60, which is remedial and should be liberally construed and applied. *Throndset v. L.L.S*, 485 N.W.2d 775 (N.D. 1992); *King v. Montz*, 219 N.W.2d 836 (N.D. 1974). This Court has also held that "neglect of third parties" is a cause for relief. *Kulm Credit Union v. Harter*, 157 N.W.2d 700 (N.D. 1992).

Federal Rule of Civil Procedure 60 can properly be invoked to more clearly reflect the trial court's intent and purpose, and it has broad discretion to grant it. 12 Moore's Federal Practice 3d Section 60.11[c] and 60.22. Moreover, Rule 60(b) provides a method under which a court is required to set aside a void judgment, and here BTA was a "person needed for just adjudication" in accordance with Federal Rule of Civil Procedure 19, because in its absence complete relief could not be accorded among the parties, and it claims an interest in the subject matter of the action and is so situated that the disposition of the action in its absence may have, as a practical matter have impaired or impeded its ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring multiple or

inconsistent obligations. *Id* at Section 60.44. Therefore, the *Koch v. MDU* decision is void, because BTA was not joined, and in these circumstances a Rule 60 motion must be granted. In the further alternative, relief could reasonably have been granted under Rule 60(b)(4), which is a "catch-all" provision representing a reservoir of equitable power. *Id.* at Section 60.48. An extraordinary circumstance warranting relief exists here, since otherwise MDU is permitted to retain approximately 75% of the damages it caused, and these amounts would not be recovered by BTA, which incurred the losses. *Id.* at Section 60.48[3]. Further, in *Koch v. MDU*, the trial court and the Eighth Circuit also ruled without the knowledge or participation of BTA, which is not at fault, because it had relied on Koch's written commitment to keep it apprised of "major developments," which is another ground for relief. *Nat'l Credit Union Administration v. Gray,* 1 F.3d 262, 266 (4th Cir. 1993). In the further alternative, if BTA had intervened and become a party, it is a reasonable inference that MDU and Koch would not have been able to settle their lawsuit without BTA's consent by an agreement under which the Trenton Phillips Contract was terminated and BTA received nothing. In light of all these considerations, if this Court had properly afforded BTA all reasonable inferences in opposing summary judgment, which is required, summary judgment should not have been affirmed.

III. THE SETTLEMENT WAS NOT LIMITED TO KOCH'S 25% SHARE.

The third basic error that BTA is addressing concerns this Court's determination that Koch should not be required to share the settlement payments it received pursuant to its percentage-of-proceeds and similar contracts with BTA, because the settlement was limited to "Koch's own 25 percent of the losses." Slip Op. at 11. Whether this is correct is respectfully at least a disputed issue of material fact on which summary judgment should not have been affirmed. BTA acknowledges that the settlement resolved Koch's claims for damages from MDU in *Koch v. MDU*, but that does not mean

that the settlement could not, and did not, include additional matters. Here, Koch had sued MDU for breach of contract but not to terminate the existing contracts. 988 F.2d 1532. Moreover, the stated purpose of the Settlement Agreement was for the parties "to settle their disputes and differences on the remanded issues, terminate the aforementioned litigation, and mutually release, as set forth in this Agreement, the other from liability arising from the CONTRACTS," not merely to settle the pending case. Exhibit 10 at 1 (emphasis added). Further, in the Agreement MDU agreed to pay Koch three separate amounts--(1) $8,297072.00 "for money owed to Koch for gas which WBI actually purchased from Koch prior to October 1, 1993;" (emphasis added); (2) $28,702,928.00 in return for a release and discharge "of and from any and all liability, claims, demands, judgments or obligations of every name or nature, prior to October 1, 1993, including without limitation all obligations to make further payments or carry out other undertakings in connection with the CONTRACTS;" and (3) to terminate the existing contracts. Exhibit 10 at 2-3. Therefore, although the approximately $8 million payment under Paragraph 1 of the Settlement Agreement was expressly in consideration of damages that Koch had incurred, the payments under Paragraphs 2 and 3 of the Settlement Agreement were not. The contracts which were terminated unquestionably covered 100% of the contract volumes and were not limited to Koch's share. Thus, BTA respectfully submits that this Court's determination that Koch and MDU were only settling on Koch's 25% share is contrary to the Settlement Agreement.

Koch tried to establish that the Agreement was limited to its 25% share through the affidavit of Don Cordes, but as BTA demonstrated at pages 30-31 of its Initial Brief, Cordes' credibility is disputed, precluding summary judgment. Furthermore, Mr. Tipton of MDU negotiated the Settlement Agreement with Cordes, and he testified that MDU was settling on all the gas volumes and the contract in its entirety, confirming the existence of disputed facts which require summary judgment to be denied.

IV. SUMMARY JUDGMENT ON LIQUIDS SHOULD BE REVERSED.

The fourth matter that BTA will address is that this Court's affirmance of the trial court's summary judgment decision regarding the claims for an accounting on liquids was erroneous. This Court based its ruling on its finding that BTA's evidence supporting the liquids claim was the affidavit of their expert Carol Freedenthal, which is "conclusory and speculative." Slip Op. at 17. The Court also found that even though BTA cited evidence indicating that Koch lowered the prices that Koch paid it for liquids, it failed to show that BTA received less than the market price, and that although BTA stated that it could not provide more specific evidence because Koch had failed to provide it with discovery, it had ample time for discovery and did not comply with Rule 56(f). *Id.* at 18-19. BTA respectfully submits that these determinations are in error.

First, Koch filed a "no evidence" motion for summary judgment concerning the liquids, and this motion should have been denied, because Koch did not meet its initial burden to properly establish that there were no material issues of fact in dispute. *Zueger v. Carlson*, 542 N.W.2d 92 (N.D. 1992); *Dakota Bank & Trust Co. v. Grinde*, 422 N.W.2d 813 (N.D. 1988).

Moreover, this is an unusually large case in which Koch alone produced a room full of paper documents as well as over 1400 computer floppy disks of accounting records. Rather than submit all the voluminous evidence in response, BTA reasonably submitted three affidavits from Freedenthal (including attachments) and the deposition of Marsha Helmer, Koch's Corporate Representative and Controller. Exhibits 1, 20, and 26 at 4 and 6-7. Koch did not object to the admissibility of Freedenthal's affidavits, so potential objections were waived. Furthermore, even though the affidavits do contain some conclusions, they are expressly authorized by Rule 704, which allows opinions regarding ultimate issues.

Moreover, read together, BTA's evidence cannot accurately be characterized as "speculative." BTA had admittedly not completed its discovery from Koch, so Freedenthal appropriately acknowledged that his determinations were subject to modification based on further evidence. However, his determinations that Koch had breached its contracts with BTA regarding liquids were unequivocal, as he stated at Paragraph 12 of his first Affidavit dated September 3, 1999 (*e.g.*, "Koch materially misstated the value of the liquefiable hydrocarbons in paying the Plaintiffs by transferring the liquids between its affiliates and using inter-affiliate transfer prices that were less than the market value."). Exhibit 1. Further, contrary to this Court's decision, in his April 17, 2000 Affidavit, Freedenthal unequivocally found that, "Koch is accepting less than market prices for the liquid products and thus short changing the producers from moneys owed to them." Exhibit 20, Paragraph 9. As an expert Freedenthal was entitled to state his opinion on ultimate issues, and on summary judgment, those opinions should be assumed to be correct. Therefore, this Court could not properly determine as a matter of law that summary judgment should be affirmed.

Moreover, Freedenthal provided more than his opinions regarding ultimate issues. In Paragraphs C and D of his April 17, 2000 Affidavit, Freedenthal showed by example that Koch had not paid BTA based on market prices, and he supported his determinations with discovery documents. For example, in Paragraph C, Freedenthal found with reference to bates stamp documents KII000621 and 000623 that the market value for propane was $0.2211 per gallon for a month at issue, yet Koch only paid Appellants based on a value of $0.1317 per gallon, resulting in an underpayment of over $200,000. Further, the two primary locations at which prices for liquids are "posted" in North America, thereby indicating their market value are Mt. Bellvieu, TX (for the Gulf Coast) and Conway, KS (for the Midcontinent, including North Dakota). Koch itself used posted prices to value the liquids. Exhibit 26 at 192-193. In Paragraph D, Freedenthal explained

that in March 1992 Koch sold butane to Cenex for $0.32 per gallon, which was the market value shown both by that arms' length sales and by the Conway, KS posting. Yet Koch paid BTA based on a price of $0.1822 cents per gallon based on an interaffiliate transfer to Koch Hydrocarbon Canada. Moreover, there is additional evidence that Koch didn't properly pay BTA. Ms. Helmer, Koch's Corporate Representative, testified that there wasn't even an entity called Koch Hydrocarbon Canada. Exhibit 26 at page 11. This is an admission for purposes of summary judgment. 11 *Moore's Federal Practice 3d*, Section 56.14[2][d][iii]. Thus, contrary to this Court's determination at page 18, BTA established that Koch paid it approximately $.09 less than the market value based on interaffiliate transfers in one month and $0.14 less than the market value in another month based on alleged transfers to an entity which Koch has admitted didn't even exist. BTA certainly shouldn't be required to show anything more when it has sued for an accounting of the damages resulting from Koch's actions.

Additionally, Koch's actions represented breaches of Koch's contracts with BTA, which were all filed in opposition to Koch's Motion for Summary Judgment. Freedenthal characterized them as commonly percentage-of-proceeds contracts in Paragraph 10 of his September 3, 1999 Affidavit, and this Court described them similarly in its April 16, 2002 decision. However, this can all be confirmed by referring to the two Sinclair and Exxon contracts that were attached as Exhibits. Exhibit 23 at SIN-01149 and Exhibit 29 at KII000122. The other filed contracts are in general similar. The Exxon contract, for example, defines the term "net sales proceeds" as

> the proceeds received by Processor (Koch) as a result of the sale of the particular product I question less taxes applicable thereto and less costs incurred downstream from the plant tailgate for the recovery and disposition of such product.

Thus, it does not include transfer prices to Koch entities at levels which is far less than the market value, and this is even more apparent where Koch has admitted that the entities don't even exist. Under contractual provisions of this nature, proceeds also do not include interaffiliate profit margins that Koch erroneously reported to the State of North Dakota and BTA as costs. Initial Brief at 40, Exhibit 26 at 86-92 and 100-103. Helmer also admitted that Koch delivered BTA's liquids into storage in months when it expected prices would rise, valued the liquids based on the lowest posted price for the months in which the liquids were produced, and never paid BTA the increased prices that Koch obtained when the liquids were sold from storage. *Id.* at 67-73. She additionally admitted that, notwithstanding the contractual language referenced above, Koch charged BTA for costs incurred upstream of the plant tailgate. *Id.* at 93-94. Again, this is all not only summary judgment evidence, but most of it represents admissions by Koch. Thus, not only should summary judgment be denied, but to the contrary, BTA has essentially proved breaches of contract as a matter of law.

Koch moved for summary judgment, and on December 15, 1999, the trial court denied those motions, granting BTA a continuance to supplement its summary judgment responses. BTA subsequently took the deposition of Helmer on March 28 and 29, 2000, who was not knowledgeable on many issues, and BTA promptly filed a Motion to Compel and for Sanctions, which was pending when the trial court granted summary judgment. Exhibit 28. Therefore, not only did BTA show that summary judgment should be reversed on the liquids accounting issues. BTA also promptly pursued discovery in accordance with the trial court's rulings, which makes this case distinguishable from the authorities that this Court cited in Paragraph 52 of its decision.

V. CONCLUSION

WHEREFORE, for the reasons stated herein and in its prior pleadings, BTA respectfully submits that rehearing should be granted.

Dated this __ day of April, 2002.

Respectfully submitted,

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IN THE SUPREME COURT STATE OF NORTH DAKOTA
BTA OIL PRODUCERS, Supreme Court Case No 20010122
MDU RESOURCES GROUP, INC, et al, Appellees
Appeal from Judgment of Stark County District Court,
Southwest Judicial District
The Honorable Allan Schmalenberger, Presiding

BRIEF OF APPELLANTS BTA OIL PRODUCERS, ET AL.

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STATEMENT OF ISSUES 1. Whether the trial court properly decided to enter summary judgment against the Appellants based on *Apache*, when most of Appellants'.claims were not addressed by that case. 2. Whether MDU is judicially estopped from disputing Appellants'.unjust enrichment claims, because it successfully asserted a position in Koch v. MDU, which the trial court has expressly determined to be inconsistent with its position here. 3. Whether a party must establish that it was injured in order to assert a claim in unjust enrichment. 4. Whether MDU, Koch, and the Appellants agreed that MDU should escape liability for millions of dollars of admitted breach of contract damages because of the way that they structured their contracts in a "complicated three-party transaction." 5. Whether this Court should establish the precedent that producers of raw materials which sell their production under percentage-of-proceeds contracts are barred from receiving damages attributable to the resale of their products, and that the purchasers of those products in the resales do not have to disgorge 100% of any damages that they caused. 6. Whether the trial court properly granted summary judgment on claims that it did not address in its decisions. 7. Whether the trial court properly determined that Koch cannot be liable for breaching its written commitment to the Appellants to keep them apprised of "major developments" in the *Koch v. MDU* case as a matter of law. 8. Whether the trial court properly determined, as a matter of law, that Koch cannot be liable for failing to share settlement payments with the Appellants which Koch obtained in lieu of amounts that Koch would have been contractually obligated to pay them. 9. Whether the trial court properly determined that Koch cannot be liable to the Appellants for breaching its agreement to maximize sales to MDU by terminating the contract under which these sales were to be made. 10. Whether the trial court properly determined, as a matter of law, that Koch cannot be liable to the Appellants for failing to implement their Koch contracts in good faith when Koch circumvented those contracts by settling with MDU to Koch 's own advantage and to

Appellants' detriment. 11. Whether the trial court erred in entering summary judgment on those claims when the Appellants showed specific grounds to impeach Koch's affiant and there is a disputed issue of material fact concerning the claim. 12. Whether the trial court properly entered summary judgment on Appellants' unjust enrichment claims against Koch on the basis that the Appellants have direct contracts with Koch, before the court determined whether those contracts provide "perfect and complete justice." 13. Whether the trial court erred in granting summary judgment on the Appellants' claims for an accounting regarding liquefiable hydrocarbons on the basis that the Appellants had not "identified" which Appellants were seeking an accounting, when Exxon was specified in the Complaint, when the other Appellants were referred to, when the contracts under which the claims were made had been filed, and where Koch had failed to file a Motion for a More Definite Statement or a discovery request for the names. 14. Whether the trial court erred in finding, as a matter of law, that the Appellants could not prove that Koch improperly accounted to them for liquefiable hydrocarbons, when Koch committed acts which violate its contracts with the Appellants, such as deducting from its payments to them as a "cost" an interaffiliate profit margin, whiting out the word "margin" when caught by North Dakota officials, writing over it a different description, yet still showing it as a "margin" on its own records. 15. Whether the trial court erroneously determined that Contract MCK-1590 is a contract for the sale of goods governed by the UCC and subject to a four-year limitations period, when the parties themselves characterized that agreement as a "Gas Processing Agreement," and the only case which addresses whether a "Gas Processing Agreement" is governed by the UCC holds that it is not. 16. Whether In the Interest of W.M.V. is good law. 17 Whether the trial court correctly determined that Exxon did not assert its treating fee claim against Koch when it filed its Complaint with its Motion to Intervene, but when the Appellants subsequently filed their First Amended Complaint containing

identical language. 18 Whether the trial court correctly denied Appellants' Motion for Leave to File a Second Amended Complaint under the liberalized standards established by this Court, where the trial court erroneously determined that the amendments would have been futile and would have prejudiced the Appellees. STATEMENT OF THE CASE This lawsuit is on appeal to review the trial court's improper grant of summary judgment and its related denials of Appellants' motions to amend their Complaint and for discovery and sanctions. The Appellants are eleven natural gas producers: BTA Oil Producers, Cenex Harvest States Cooperatives, Conoco Inc., Equitable Production Company, Exxon Mobil Corporation ("Exxon"), Midgard Energy Company, Sinclair Oil Corporation ("Sinclair"), Kerr-McGee Oil Gas Onshore L.P., TBI Exploration, Inc., Tipperary Oil & Gas Corporation, and Tom Brown, Inc., The Appellees are MDU Resources Group, Inc., Williston Basin Interstate Pipeline Company, (collectively "MDU "), Koch Industries Inc., and its division, Koch Hydrocarbon Company (collectively "Koch"). Koch owned and operated the McKenzie plant. 988 F.2d 1532. The Appellants and their predecessors entered into approximately ninety "Gas Purchase Contracts" and "Gas Processing Agreements" with Koch. The contracts have been filed and contain over forty variations of pricing provisions, which are summarized in Exhibit 1, an Affidavit from Appellants'.expert. Under the contracts the Appellants typically receive a percentage-of-proceeds from Koch or an amount that depends on Koch 's disposition of the gas. The amount returned to the Appellants varies but is typically in the range of 75%. Koch processed the Appellants' gas and sold the resulting processed or "residue" gas to MDU under the so-called McKenzie and Phillips Contracts and other agreements. 988 F.2d 1534 and 1536. The first claims in this case are similar to the one which this Court addressed in *Apache Corp. v. MDU* Resources Group, 603 N.W.2d 891, 1999 ND 247 (N.D. 1999) ("*Apache*".). There, another gas producer asserted unjust enrichment and implied trust claims arising out of

Koch Hydrocarbon Co. v. MDU Resources Group, Inc., 988 F.2d 1529 (8th Cir. 1992 ("*Koch v. MDU* breached its Koch contracts both by not purchasing all the required gas and by not paying the contract price, and it sued to recover for 100% of the volumes encompassed by the contracts. However, the federal district court limited Koch's recovery to 25%, because the other 75% of the losses had been borne by the gas producers. This Court held on appeal that *Apache* had not properly stated a claim. The Appellants here have sued MDU under similar theories, and the trial court granted summary judgment against them. But as the Appellants will explain, they are differently situated and are making new contentions which require reversal. Second, even though Apache had privity of contract with Koch, it only sued MDU. One of MDU's main arguments was that *Apache* had privity with Koch, so if *Apache* had a legitimate problem, wasn't it improper (and also suspicious) that Apache hadn't sued Koch? Thus, at the oral argument in *Apache*, Justice Neumann asked Apache 's counsel why it hadn't sued Koch, and Counsel equivocated. However, unlike the Appellants, *Apache* had pursued its claims against Koch in an arbitration, they were determined not to be arbitratable, and the statute of limitations had apparently run. In contrast, the Appellants here have sued both MDU and Koch. Therefore, unlike Apache, the Appellants' second set of claims is against Koch. Accordingly, even if this Court were to apply *Apache*, the Appellants have brought claims against Koch on which summary judgment should not have been granted. Third, in another different matter, the Appellants have also sued Koch seeking an accounting for liquefiable hydrocarbons that were recovered from their gas. The liquefiable hydrocarbons are separate from the residue gas which Koch contracted to sell to MDU. Thus, neither the *Koch v. MDU* case, *Apache*, is controlling. And fourth, Exxon sued Koch for charging it an improper "treating fee".under Contract MCK-1590. On July 3, 2000, the trial court issued a 6-page Memorandum Decision granting summary judgment against the Appellants on the first three sets of issues based expressly on Apache

(i.e., the unjust enrichment claims against MDU, the claims against Koch concerning residue gas, and the claim against Koch for an accounting on liquefiable hydrocarbons) even though (1) Koch was not a party in Apache, so claims against Koch were not before this Court; and (2) Apache did not include any claims concerning liquefiable hydrocarbons. The trial court subsequently granted summary judgment for Exxon on whether Koch had improperly calculated treating fees, but it also granted summary judgment for Koch regarding the statute of limitations. The Appellants are appealing the trial court"s erroneous grant of summary judgment on: (1) their unjust enrichment and implied trust claims against MDU; (2) their claims against Koch concerning residue gas; (3) their claims against Koch for an accounting regarding liquefiable hydrocarbons; and (4) the statute of limitations. By way of background, when natural gas is "processed,".at least two byproducts result-- (1) a processed or "residue".stream, and (2) a stream of liquid or liquefiable hydrocarbons which can be sold undifferentiated or can be further split or "fractionated".into separate products, such as propane, and sold. 988 F.2d 1534. Although Koch contracted to sell the residue gas to MDU, Koch sold the liquefiable portion of the gas to other customers. When MDU breached its contracts with Koch, Koch reduced the prices it was paying the gas producers, including Apache and the Appellants, under their percentage of proceeds and similar contracts. 988 F.2d 1533. Unknown to the Appellants, however, Koch and MDU had agreed that Koch would pass the price reductions on to the gas producers and would not sue MDU, provided that MDU would take steps to keep Koch whole. This was wrong, in violation of Koch 's duty of good faith, and typifies the self-serving approach throughout. Despite their secret agreement, Koch eventually sued MDU in early 1987, and it sent the Appellants and their predecessors letters dated February 27, 1987, in which Koch advised them of the lawsuit and committed to keep them apprised of "major developments" in it. It was so clear that MDU had breached the contracts that MDU "essentially conceded" it at oral argument. 988 F.2d

1533. However, MDU asserted that Koch was not the "real party in interest" with respect to 75% of the damages, and that the gas producers had sustained the economic losses to that extent. The trial court accepted MDU 's argument and entered judgment for $31,990,300. 988 F.2d 1532. The Eighth Circuit reversed and remanded on several issues, including the contract price, which substantially impacts damages, but it affirmed the 75% reduction. 988 F.2d 1547. Koch has admitted that both the trial court 's and the Eighth Circuit 's decisions, including the 75% reduction in damages attributable to the gas producers, were "major developments," but Koch did not apprise the Appellants that they had occurred. Moreover, Koch and MDU were the only parties to the contracts which Koch alleged MDU had breached. Thus, it was not initially apparent that the gas producers could or should intervene. Later, when the trial court decided that Koch could only recover 25%, the gas producers' unjust enrichment claims arose. Further, if Koch had informed the Appellants of the reduction, they would have sued, intervened, or taken other action to ensure that they recovered their shares of the damages. And the Eighth Circuit decision in *Koch v. MDU* indicates that if the gas producers had intervened, they would have recovered. ("The other producers did not intervene in Koch's suit, and Koch should be allowed to collect only the damages it sustained. ") 988 F.2d 1547. However, if the gas producers had intervened, Koch would have lost control of its lawsuit, including the right to settle for all Koch and producer-related interests. While Koch v. MDU was on remand, Koch and MDU did settle. Even though Koch's judgment had been for less than $32 million, Koch received $40 million in cash and physical facilities from MDU which had a net book value of approximately $10 million. Thus, Koch received a premium of more than $18 million in excess of the underlying judgment. Moreover, the Phillips Contract had approximately ten more years to run, so gas producers were generally entitled to receive 75% of the economic benefits for another ten years. Additionally, Koch had contractually committed to maximize its sales of

Appellant gas to MDU. Nevertheless, in direct violation of this provision, and contrary to its duty of good faith, Koch agreed as part of its settlement with MDU to terminate the Phillips Contract, thereby reducing those sales and the Appellants' proceeds. See Settlement Agreement at Para. 3. Moreover, to benefit itself to the detriment of the gas producers, Koch separately contracted to sell its own gas to MDU. Further, notwithstanding the percentage of proceeds and similar contracts, Koch kept the entire $50 million. Additionally, Koch agreed that MDU could gerrymander its payments to Koch among the various issues being settled, which enabled MDU to pass through to its ratepayers the largest amount of its settlement payment that could conceivably be justified. Thus, MDU got off the hook for hundreds of millions of dollars of damages, and almost the entire loss was passed through to the ratepayers. Koch pocketed approximately $50 million on a $32 million judgment and continued to sell its own gas to MDU, and the gas producers got nothing at all. This case involves many complicated "Gas Purchase Contracts "and "Gas Processing Agreements" covering multiple wells for the entire fifteen-year period from 1985 until 2000. 988 F.2d 1536. Consequently, it presented an unusually burdensome case at the time when one of three judicial positions was being eliminated in the Southwest Judicial District. Furthermore, the parties had filed motions for summary judgment, which encompassed almost all the issues. Moreover, this Court 's decision in *Apache* is at least relevant, and an appeal was inevitable. Thus, on July 3, 2000, the trial court issued its 6-page Memorandum Decision granting summary judgment against the Appellants on all the issues, except for Exxon's treating fee claim. One way to interpret the trial court 's decision is an attempt to obtain guidance from this Court regarding the application of *Apache* here before it had to undertake a burdensome trial. On October 4, 2000, the trial court also entered a 19-page Order proposed by the Appellees, which is in the form of a brief and contains arguments and conclusions which were concocted by the Appellees, and are

nowhere even suggested in the trial court 's July 3, 2000 Memorandum Decision. ARGUMENT Summary judgment should only be granted if there is no dispute regarding the material facts or inferences to be drawn from them. *Van Valkenberg v. Paracelsus Healthcare Corp.*, 606 N.W.2d 908, 2000 ND 38 (N.D. 2000); *Hurt v. Freeland* 589 N.W.2d 551, 1999 ND 12 (N.D. 1999). The evidence must be viewed in the light most favorable to the opposing party, who must be given the benefit of all favorable inferences. *Hurt, supra*, *The Perry Center, Inc. v. Heitkamp*, 576 N.W.2d 505, 1998 ND 78 (N.D. 1998), and *Johnson Farms v. McEnroe*, .568 N.W.2d 920, 1997 ND 179 (N.D.1997). The trial court's grant of summary judgment against the Appellants should be reversed, because these demanding standards are not satisfied. 1. JUDICIAL ESTOPPEL BARS MDU FROM EVEN DISPUTING APPELLANTS'.UNJUST ENRICHMENT AND IMPLIED TRUST CLAIMS. First, the Appellants respectfully submit that MDU is barred from challenging the unjust enrichment and implied trust claims under judicial estoppel. This Court expressly recognized judicial estoppel in *Littlefield v. Union State Bank*, 500 N.W.2d 881 (N.D. 1993), and it has also been broadly recognized and applied in several nearby states. See In re Hoffman, 99 B.R. 929 (N.D. Iowa 1989), Zwemer v. Production Credit Ass 'n , 792 P.2d 245 (Wyo. 1990), Held v. Mitsubishi Aircraft Intern. Inc., 672 F. Supp. 369 (D. Minn. 1987), Bloxem v. Mountain West Farm Bureau Mut. Ins. Co., 43 F. Supp. 1121 (D. Mont. 1999), and State v. Petty, 548 N.W.2d 817 (Wisc. 1996). Judicial estoppel provides that where a party takes a position in one legal proceeding and succeeds, it cannot thereafter take a contrary position in a second case. 28 Am. Jur.2d Estoppel and Waiver Section 71. Or expressed more colloquially, a party should not be allowed to talk out of both sides of its mouth in two cases and unfairly win both. Thus, the purpose of judicial estoppel is to protect the integrity of the judicial process: "The principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events.". Astor

Chauffeured Limousine Co. v. Runnefeldt Inv. Corp., 910 F.2d 1540, 1547 (7 th Cir. 1990). Inconsistent positions in sequential suits not only multiply the number of decisions, undermining principles of finality, but also facilitate double recovery. Why should one be entitled to win the first suit by demonstrating A and the second suit by establishing A? One of these must be wrong.... *Id.* Further, judicial estoppel does not require privity before a party can invoke it. See *Ryan Operations v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996), citing Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 n.6 (8 th Cir. 1987), Patriot Cinemas Inc. v. General Cinema Corp., 834 F.2d 208, 214 (1 stCir. 1987), and Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6 th Cir. 1983). In Koch v. MDU, MDU repeatedly contended that gas producers like the Appellants were the real parties in interest and had sustained most of the economic losses. In opposing Koch 's Motion for Summary Judgment, MDU asserted that, "It is axiomatic that the real party in interest in an action for damages is the party who has, or can at least offer evidence that he has, actually been damaged by the underlying events.... [V]irtually all of the effects of reduced gas cost and things like that were passed on to the producers." Exhibit 13A at 28 and 31-32. In its Trial Brief MDU asserted that, "much of the burden of decreased gas prices is passed up the line to producers who sell to Koch.". Exhibit 13B at 47-48. In its opening Appellate Brief, MDU stated: "... As the result of all these various arrangements, when MDU reduced its purchases from Koch, the producers bore the burden.... Exhibit 13C 65-68. And in its Reply Brief, MDU maintained that, "As a result, when MDU reduced it purchases from Koch, the producers sustained a 75% share of the deduction from the price differential, Koch took at most a 25% share of the loss.... Exhibit 13D at 27. Furthermore, MDU was successful in making these contentions, because the federal district court reduced Koch 's damage claim by 75%, and the Eighth Circuit affirmed. Therefore, in Koch v. MDU, MDU successfully contended that the gas producers Bore the losses. In this case MDU inconsistently maintains

that gas producers like the Appellants shouldn't recover, because MDU 's breaches of contract did not cause them any losses. Instead, MDU argues basically that 75% of its admitted damages are unrecoverable, because the gas producers had percentage-of-proceeds contracts with Koch. To quote MDU, the percentage-of-proceeds contracts enabled MDU to have "escaped loss. "This is exactly the opposite of what MDU repeatedly contended in Koch v. MDU. Although the trial court did not address the Appellants'.judicial estoppel argument in its July 3, 2000 Memorandum Decision, it adopted the Appellees'.proposed Order, including the following language: If MDU/WBI argued that Koch was not the real party in interest for some of the damages it claimed in the litigation with MDU/WBI, that argument is inconsistent with MDU/WBI 's position in this litigation. As determined by the Eighth Circuit Court of Appeals, Koch 's payment obligation to the producers was reduced as the result of lower prices it received from MDU/WBI and third parties. Therefore, any monetary loss to Koch was reduced.... Exhibit 12 at 8 (emphasis added.) With all due respect to the trial court, the quoted statements don 't follow. In the first sentence the trial court makes the express finding that MDU 's contention in Koch v. MDU is inconsistent with MDU 's position here. The trial court 's determination is correct, and because the essence of judicial estoppel is the assertion of inconsistent positions, judicial estoppel inescapably applies. However, the trial court's subsequent discussion is confusing. What the trial court seems to be implying is that there is no inconsistency; in Koch v. MDU MDU argued that Koch couldn 't recover, because it wasn 't the real party in interest, and here MDU asserts that the gas producers cannot recover either, because the payments they were entitled to receive were reduced by their Koch contracts. There are two fatal flaws in this position. First, it is irreconcilably opposed to the trial court 's explicit finding of inconsistency in the immediately preceding sentence of its decision. And second, it misconstrues MDU 's contentions in Koch v. MDU. As shown above, MDU not

only asserted in Koch v. MDU that Koch wasn't the real party in interest, but it additionally contended repeatedly that the gas producers bore the losses (e.g., "...the producers sustained a 75% share of the deduction from the price differential.... ") Therefore, to use the language from Astor, MDU "is stuck" with the position that it successfully took in Koch v. MDU, and judicial estoppel bars it from disputing its liability to the Appellant gas producers here. Summary judgment should be overturned. HE TRIAL COURT 'S GRANT OF SUMMARY JUDGMENT ON THE APPELLANTS'.UNJUST ENRICHMENT AND IMPLIED TRUST CLAIMS AGAINST MDU ALSO VIOLATES WELL-ESTABLISHED PRINCIPLES OF RESTITUTION, IMPROPERLY CREATES AN ECONOMIC INCENTIVE TO BREACH CONTRACTS, AND ESTABLISHES BAD PRECEDENT. In the alternative, this Court should either reevaluate its decision in Apache or decide not to apply it. A. Under Well-Established Principles of Restitution, a Plaintiff is Not Required to Prove that He is Injured in Order to State a Claim. First, the parties did not properly explain the principles of restitution in Apache, so they were inadvertently misapplied. In Apache, the Court relied on Dobbs, Law of Remedies and the Restatement of Restitution. In Section 4.1, Dobbs discusses "Restitution and Unjust Enrichment ": Restitution is a large diverse and important topic with a significant literature of its own. Most generalizations about restitution are trustworthy only so long as they are not very meaningful, and meaningful only so long as they are not very trustworthy. There are, however, some core ideas. Dobbs at 550-551. Dobbs'.first "core idea".about restitution is what he labels "Defendant 's gains, not plaintiff 's losses. ". Id. at 550. This is that a claim for unjust enrichment can properly be made even if the plaintiff does not assert that he has been injured. "Restitution is a return or restoration of what the defendant has gained in a transaction. ") *Id.* at 552. A good example is that a principal is entitled to a bribe received by an agent even though it resulted in no loss to the principal. See Restatement of Restitution, Section 128 comment f and

Federal Sugar Ref. Co. v. United States Sugar Equalization Board, 268 F. 575, 582 (S.D.N.Y. 1920). The Appellants respectfully submit that this Court may have overlooked Dobbs' first "core idea" when it decided Apache. There, the Court stated that a plaintiff can only recover in unjust enrichment if the defendant has received a "benefit at the direct expense "of the plaintiff, citing Section 1 of the Restatement. Section 1 does provide that, "A person who has been unjustly enriched at the expense of another is required to make restitution to the other," but Comment e to Section 1 states: In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. Thus, although a plaintiff seeking to recover in unjust enrichment will often be injured, this is not a prerequisite. Because a plaintiff asserting a claim in unjust enrichment is not required to establish that it was injured, this is respectfully not a correct basis for barring Appellants'.unjust enrichment claims. Moreover, MDU did receive benefits at the expense of Appellants, because its costs of buying gas were dramatically reduced. B. The Appellants are Also Not Precluded from Asserting an Unjust Enrichment Claim Against MDU Because They Entered into a Complicated Three-Party Transaction. In Apache, the Court also relied on language from Section 4.1(2) of Dobbs, to the effect that where three parties are involved in a complicated transaction, and they could have contracted with each other but didn 't, they should only be liable under the contracts which they executed. This language does not apply here for six reasons. First, the quoted language expressly states that it only applies when, "[t]he parties could have contracted with both others, but they did not.". MDU purchased processed residue gas for its pipeline system. Thus, the producers'.gas had to be processed by Koch first. The Appellees did not prove that the Appellants could have contracted for their gas directly with MDU, this was not an undisputed fact upon which the trial court based its summary judgment ruling, and the record evidence is to the

contrary. Second, the cited language is from a Section titled "Three Party Dealings; Improvements by Subcontractors.". There is a critical distinction. The subcontractor and the general contractor are liable by contract for 100% of the damages between them, and the general contractor and the homeowner are similarly liable by contract for 100% of the damages between them, but an extraneous event like a bankruptcy occurs and makes it impossible to enforce a contract. However, MDU is seeking something very different -- to limit its total exposure to all parties to only 25% by implication from the fact that it only contracted with Koch. When this Court has previously denied claims for unjust enrichment based on the existence of contracts, it has first specifically determined that a contract remedy already existed for the full amount of the damages. See, e.g.,D.C. Trautman Co. v. Fargo Excavating Co., Inc. , 380 N.W.2d 644 (N.D. 1986). Under Koch v. MDU, there is no such remedy available. Thus, there is no authority that the "three party transaction" rule should be applied to bar recovery in unjust enrichment where a contractual right to recover 100% of the damages does not exist. Third, the cited quotation appears in Section 4.9(4) of Dobbs, which is titled "Intentionally Conferring Non-Cash Benefits Where Parties Could or Did Contract.". The concept underlying this principle is that if the parties voluntarily agree to limit their remedies pursuant to their contracts, the courts will honor these choices. Dobbs at 476. However, this principle is not North Dakota law. This Court has repeatedly decided cases in which it has affirmed unjust enrichment awards where two parties had the opportunity to contract but didn'do so, and it has granted relief in a manner inconsistent with parties' contracts. See, e.g., Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555 (N.D. 1981) (Midland contracts with J & S when it could have contracted with Gilbert, but this Court affirms an unjust enrichment award against Gilbert anyway); Estate of Hill , 492 N.W.2d 288 (N.D. 1992) (Pijan is Hill 's bookkeeper and lover. Although the parties could have contracted but didn 't, this Court permits recovery

against Estate in unjust enrichment); In re Zent, 459 N.W.2d 795 (N.D. 1990) (analogous facts and outcome); and Gate City Savings and Loan Ass 'n v. IBM, 213 N.W.2d 888 (N.D. 1973) (Gate City contracts with IMT, which contracts with IBM. Gate City recovers in unjust enrichment against IBM in a complex three-party transaction, although its contract was with IMT, and IBM made many of MDU 's contentions). See Murdock-Bryant Construction, Inc. v. Pearson, 146 Ariz. 48, 703 P.2d 1197 (Ariz. 1985), finding it is sufficient that the plaintiff expected payment and that the defendant received a benefit, even if the defendant is not at fault. Fourth, Dobbs recognizes that when the defendant 's "contractual autonomy" is restricted, it should not be given effect: Limits of choice with respect to the defendant 's autonomy does not mean that restitution must always be denied. No one has unlimited choices. I cannot chose to park my car in the parking space already occupied by your car. I cannot (legally) choose to refuse food for my minor children. When the defendant 's choice is limited by law or fact, restitution may not interfere with any choice he legally or practically has. Dobbs at 472. Similarly, here this Court should not infer that the parties agreed to absolve MDU of 75% of its contract damages, when that is arguably illegal and certainly is contrary to the parties'.reasonable intention and the public policy of enforcing contracts. The Appellants "Participated".in Transactions with Koch and MDU. Fifth, in Apache, the Court also relied heavily on Sivertson and Zuger v. North Dakota Ins. Guar. Ass 'n, 494 N.W.2d 135 (N.D. 1992) to support its decision. In Sivertson, this Court said: Of course, a third party who derives gain from an agreement between others has not necessarily been unjustly enriched. See, Commercial Fixtures & Furnishings, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977). If, however, the third party has participated somehow in the transaction through which the benefit is obtained, that fact must be considered by the court. (emphasis added.) 307 N.W.2d 557. Moreover, the same standard is expressed in Zuger. 494 N.W.2d 139. MDU was involved in the transactions between

Koch and the,Appellants. In fact, this Court recognized the interrelationship in Apache, when it characterized the dealings involving Apache, Koch and MDU as "more complicated transactions involving three parties.". Further, it is confirmed by the trial court's undisputed material facts. Additionally, Koch and MDU had worked together to tie up the producers' gas in the area, they worked together to keep competitors out of their base reserve area, and when MDU reduced the prices it was paying Koch for gas, MDU and Koch worked together to keep each other whole and to reduce the prices that the producers were receiving for their gas. Surely, the Appellants "participated".in the overall transactions. And sixth, it was error to grant summary judgment, even if the Appellants were not permitted to recover under one of the concepts described above. To quote Dobbs: Almost any kind of case in which the defendant gains from the plaintiff and in which it would be unjust or impolitic to permit the defendant to retain the gain is a good candidate for a restitutionary claim... Most restitution cases fall into one of the categories just listed... But restitution is open-ended; it is not limited definitionally to such cases. The plaintiff may confer a benefit upon the defendant without mistake and without wrongdoing or breach of an agreement by the defendant. Dobbs at 367-368. D. The Apache Decision is Also Contrary to Klein. Next, respectfully, this Court may not have considered Klein v. Jones, 980 F.2d 521 (8 th Cir. 1992), in deciding Apache. In Klein, the Eighth Circuit decided that oil and gas royalty owners were entitled to share in the settlement of a gas contract dispute between the operator of their wells and the purchaser of gas. The royalty owners were situated exactly like Apache, in that the royalties which they were entitled to receive fluctuated with gas prices. 980 F.2d 523. Apache and Klein are irreconcilable. E. It Would Also be Extremely Unfair Economically to Affirm Summary Judgment. The Appellants also submit that this Court would be establishing a very bad precedent if it were to affirm. The Appellants represent oil and gas producers and agricultural interests, which are among the cornerstones of this state 's economy.

There is no dispute that they bore approximately 75% of the economic losses from MDU 's breaches. MDU is transparently seeking to be absolved of that liability and to unfairly force Appellants to bear it. It is also respectfully not a good answer to say that the Appellants assumed the risk of gas prices rising or falling. Indeed, the Appellants understand and appreciate market risk. Here, the Appellants understood that they were selling their gas to Koch under contracts which contained percentage-of-proceeds or similar provisions, but they also understood that Koch had committed their gas to be sold to MDU under long term contracts which had favorable pricing provisions. Consequently, the change in the market price of gas did not injure the Appellants, because Koch had committed their gas to MDU under the long term contracts. Nor were the Appellants injured by the contracts which they had with Koch, under which the amounts they received depended on Koch. What injured the Plaintiffs was that MDU breached its contracts with Koch, so that price reductions were passed on to contrary to MDU 's existing contractual obligations. Additionally, summary judgment results in an unintended windfall to MDU. MDU would avoid repaying 75% of the breach of contract damages that it committed. MDU is a sophisticated investor-owned utility, and it knowingly entered into its Koch contracts. There is no evidence that when MDU did so, the parties intended that MDU would be absolved of its liability for breaches due to Koch 's contracts with gas producers, which were generally entered into after the McKenzie and Phillips Contracts. It Would Also be a Bad Precedent for North Dakota to Affirm Summary Judgment. Beyond the impact on the parties, the trial court 's ruling establishes terrible precedent. If the trial court 's decision is affirmed and read in connection with the Koch v. MDU decision, an economic incentive to breach contracts is created. That is because anytime a commodity is first sold under percentage-of-proceeds or similar contracts, the party purchasing the commodity on resale can breach its contracts with impunity and can never be required to repay all its damages. This is horrible policy. And this precedent will

not only harm the Appellants. Take, for example, landowners who lease their land for oil and gas development. They sometimes receive a percentage of the proceeds as a royalty. Typically the operator sells the oil and gas which is produced, and the royalty owners are usually not parties to the sales contracts. Under Koch v. MDU, the operator would apparently not be able to sue the purchaser for any breach of the resale contract on behalf of the royalty share, and under Apache, the royalty owner will not be able to sue for its share either. For this Court to protect the royalty owners, it would have to distinguish Klein. One possibility would be to say that the royalty owners have a greater entitlement to unjust enrichment, because they have a "special relationship".with operators. However, by analogy to this case, that would enable them to recover from the producers but not from either Koch or MDU, because the landowners do not have special relationships with them. But they would have nothing to recover from the operators, since the operators would have been barred from recovering the royalty owners' share. And the same principles also apply elsewhere. North Dakota has traditionally been a producer of minerals and agricultural products, which have often been processed out of state. North Dakota has been actively seeking to encourage further processing and manufacturing in-state in order to increase jobs and to stimulate the economy. The same principles discussed above apply whether we are talking about oil and gas, coal, other minerals, or the conversion of raw agricultural products into processed products like flour, pasta, cake pellets, sugar, malt, canola oil, or ethanol. Any minerals or raw agricultural products can be sold under percentage-of-proceeds or similar contracts. By affirming, this Court would be creating a precedent under which producers who have contracts by which they are paid at least in part based on the disposition of those products cannot receive a share of contract damages attributable to resale. So if this Court affirms, purchasers of processed or manufactured products will reap windfalls at the expense of local producers. In conclusion, therefore, the Appellants respectfully submit that

this Court should reverse summary judgment on their unjust enrichment and implied trust claims against MDU. MDU should be barred from disputing the claims under judicial estoppel, because it is taking a position in this case which the trial court explicitly determined is inconsistent with the one that it successfully took in Koch v. MDU. Furthermore, summary judgment is contrary to well-established restitutionary principles, by which a plaintiff is not required to prove injury. Third, summary judgment would improperly enable MDU to retain millions of dollars of contract damages at the expense of gas producers. And finally, affirmance would unwisely create a broad economic incentive to breach contracts, to the disadvantage of royalty owners, producers of agricultural products, and others.

3. MOREOVER, THE TRIAL COURT ALSO ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS'.BREACH OF CONTRACT AND UNJUST ENRICHMENT CLAIMS AGAINST KOCH.

As discussed above, Koch was not a party in Apache , so Apache does not address the validity of Appellants' Koch claims. Furthermore, Koch sold the McKenzie plant in December 1996 and, therefore, currently does limited North Dakota business. Koch does not own and operate a pipeline or a utility in North Dakota and is, consequently, not in a position to passthrough to North Dakotans the amounts of any damages it pays.

A. The Trial Court Improperly Entered Judgment Against the Appellants on their Koch Claims Without Even Addressing Some of Them.

As discussed above, when the trial court granted summary judgment, it stated that the Appellants can 't recover against MDU under Apache, so they can 't recover against Koch. Presumably because the Appellees recognized that this simple conclusion was inadequate, they proposed a detailed 19-page Order, which the trial court entered. However, as the

Appellees explained in their Response to the Defendants'.Proposed Summary Judgment Order, (31) even if the July 3, 2000 Memorandum Decision were correct, the final Order is riddled with errors. For example: The trial court didn 't address the Appellants'.allegations at Para. XXXVI of their First Amended Complaint that Koch failed to perform its contractual obligations in good faith. The trial court also failed to address the Appellants'.allegations at Para. XXXVII that it was a breach of contract and a failure to implement contracts in good faith for Koch to agree to a buyout and termination of its contracts with MDU. The trial court failed to address the Appellants'.allegations at Para. XXXVI that Koch 's settlement with MDU was a breach of contract.

The trial court failed to address the Appellants'.allegations at Para. XXXXI that they were suing Koch for actual fraud, constructive fraud, and deceipt. Moreover, the trial court failed to address the Appellants'.allegations at Para. XXXXIII that Koch 's failure to keep them apprised of major developments in Koch v. MDU constituted a breach of contract.

Because the trial court didn 't even address these claims in its decision, its grant of summary judgment should be reversed for that reason too.

B. In Addition, the Trial Court Erroneously Granted Summary Judgment on the Appellants'.Claims that Koch Improperly Failed to Apprise Them of "Major Developments."

Koch sent letters like those contained in Exhibit 9 to the Appellants by which it committed to keep them apprised of "major developments".in its MDU lawsuit. At least to the extent that the Koch contracts are governed by the UCC (which Koch has successfully asserted,) "Koch's commitments are binding without additional consideration. John Boone was a responsible Koch official. Boone testified

that the judicial determinations that Koch could only recover 25% of the damages from MDU were "major developments.

Koch stated in its interrogatory responses that Boone had knowledge of Koch 's communications with the Appellants, but Boone couldn 't recall discussing the 75% reduction with any of them. (35)</sup> Further, the Appellants submitted affidavits from the Appellants stating that if Koch had apprised them of major developments such as the 75% reduction, they would have taken affirmative steps to have protected their interests, such as moving to intervene. (36)</sup> And the Appellants'.damages expert submitted an affidavit stating that although he hadn 't completed calculations, each Appellant 's individual damages ran from hundreds of thousands to millions of dollars. In its October 4, 2000 Order, the trial court granted summary judgment stating that, "These plaintiffs simply have no viable claims against MDU/WBI. Nothing that Koch allegedly said or failed to say about the Koch v. MDU litigation to these plaintiffs effected the value of their claims against MDU/WBI.". On that point the Appellants incorporate by reference Parts 1 and 2, above and Exhibit 20.

Beyond that, there is a procedural issue which this Court should address. At Paras. XXIII- XXIV and XXXXII-XXXIII of their First Amended Complaint, the Appellants alleged that Koch had committed fraud or had breached its contracts with them by failing to keep them apprised of major developments, without specifying that if Koch had told them of such developments they would have intervened or taken other appropriate actions to protect their interests. The Appellants do not believe that this should be required to have been specifically pled, because North Dakota requires notice pleading, complaints are liberally construed, the plaintiff need not specify his theory of recovery, and it is sufficient if the plaintiff is entitled to relief under any possible theory. See, e.g., Reule v. Bismarck Public School District, 376 N.W.2d 32 (N.D. 1985); Gowin v. Hazen Memorial Hospital Ass 'n,

311 N.W.2d 554, 556 (N.D. 1981); and Estate of Hill , supra. However, to eliminate this potential issue, the Appellants moved to file a Second Amended Complaint to make this explicit. The trial court denied the Appellants'.Motion, stating again that such an amendment would be futile. To the contrary, it would not have been futile for the Appellants to have filed a motion to intervene in Koch v. MDU, so this Court should reverse the trial court 's refusal to permit an amended Complaint. And for the same reason, the grant of summary judgment should also be reversed.

The Koch v. MDU case was filed in federal court, so the standards for intervention under the Federal Rules apply. From at least 1977 to 1995, the Eighth Circuit Court of Appeals decided to resolve intervention questions without reference to standing. See Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861 (8 thCir. 1977); City of St. Louis v. Thomas, 162 F.R.D. 583, 586 (D.C. Minn. 1995), footnote 9, also citing Mille Lacs Band of Indians v. Minnesota, 989 F.2d 994, 997 (8 thCir. 1993). Moreover, the Eighth Circuit concluded that the gas producers could have intervened in Koch v. MDU and recovered. ("The other producers did not intervene in Koch 's suit, and Koch should be allowed to collect only the damages it sustained. ") 988 F.2d 1547.

The Appellants are entitled to all reasonable inferences and benefits of the doubt in opposing summary judgment. It is a reasonable inference from this language that if the gas producers had intervened in Koch v, MDU that they would have been able to recover. The trial court decided Koch v. MDU in 1991, and this Court did not even decide Apache until 1999. At best, the law unresolved until then. Thus, this Court should not infer for purposes of summary judgment that the Appellants would have been barred from suing MDU directly under the law at the time, especially in light of the Eighth Circuit language quoted above.

Alternatively, even if the Appellants could not have stated independent claims, they could have taken other actions

to protect their interests. Specifically: They could have made a better record regarding whether MDU should have only been required to disgorge 25%. If necessary, they could have expressly authorized Koch to act as their agent to recover the remaining share of the damages. They could have filed a Rule 60 motion ("Relief from Judgment or Order ") seeking further relief, and Rule 60 should be liberally construed to correct neglect of injured parties and others.   They would have been positioned to object to and defeat the unfavorable settlement. Thus, the Appellants are entitled to the inference that if Koch had apprised them of major developments, they either could have sued or intervened and taken actions to protect their interests. The trial court therefore erred when it granted summary judgment on the claims regarding Koch 's failure to keep Appellants apprised of major developments.

The Trial Court Additionally Erred when it Granted Summary Judgment on the Appellants'.Claims that Koch Violated its Contracts by Failing to Share Settlement Proceeds with Them. Justice Neumann addressed this issue during the Apache oral argument: JUSTICE NEUMANN: And then your contract said you get 75 percent of whatever Koch gets? MR. RATHERT: That 's correct. JUSTICE NEUMANN: And Judge Conmy said we 're going to give Koch one-fourth of the value of that gas. So under your contract, don 't you have the right to take three-fourths of that 25 percent from Koch? MR. RATHERT: Except that the Eighth Circuit in its opinion indicates we had no recourse against Koch.

> JUSTICE NEUMANN: How does 173; how does the Eighth Circuit reach173; MR. RATHERT: I believe that 's in the language of the Eight Circuit, Your Honor. JUSTICE NEUMANN: How do they; how do they make that kind of determination for parties not part of the lawsuit? MR. RATHERT: I had a little trouble both with their decision and with Judge Conmy 's, Your Honor. I can 't answer that question.

Another reason that Apache had difficulty answering this question may have been that it had unsuccessfully pursued its Koch claim in an arbitration. However, the Appellees agree with the thrust of the question, and they submit that the trial court erred in entering summary judgment with respect to the claim that they should have received part of the settlement. In explaining its ruling, the trial court stated:

Koch 's 1993 settlement with MDU/WBI simply gave effect to the Eighth Circuit 's ruling that Koch was entitled to recover against MDU/WBI for Koch 's damages sustained as a result of MDU/WBI 's breaches of contracts it had with Koch.

This statement is at least in part a factual determination, and it significantly is not among the "undisputed material facts,".which the trial court separately enumerated. (Instead, when the Appellees proposed their Order to the trial court, this language was buried in the "Discussion".portion of the Order.) And this fact is in dispute.

Paragraph 4 of the Settlement Agreement does state that Koch and MDU allocated the specific dollar amounts contained in Paragraphs 1-3 by resolving "to their satisfaction "the various legal issues that had been decided. However, in their depositions Koch 's and MDU 's witnesses acknowledged that this wasn 't the whole story. As discussed further in Part 7, infra, Koch and MDU instead agreed on a settlement amount, and then Koch permitted MDU to gerrymander the dollars around between various issues in order to maximize the amount of the settlement that MDU could passthrough in its rates.

Furthermore, the settlement was expressly an agreement to settle the Koch v. MDU case. There Koch had sued for the price differential on 100% of contract volumes, and the Settlement Agreement resolved those claims.

Thus, the settlement didn 't only encompass Koch 's 25%. Further, Paragraph 3 of the Settlement Agreement included a buyout of Koch 's existing contracts with MDU, under which the gas producers were to receive 75% of the economic value. Therefore, contrary to the trial court 's determination on this disputed factual issue, the amounts which Koch received pursuant to its settlement with MDU were not solely paid with respect to Koch 's 25% interest. Koch points to the affidavit of Don Cordes, Koch 's Executive Vice President, in support of its position. However, given the other terms of the Settlement Agreement, at best this creates a disputed fact issue. Moreover, as Professors Wright, Miller & Kane have written:

Doubts as to the credibility of the movant 's affiants or witnesses may lead the court to conclude that a genuine issue exists... Clearly, if credibility of the movant 's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to go to trial.... (Emphasis added.) 10A Federal Practice and Procedure, 441-447. This approach is supported by other authorities, such as Securities and Exchange Com 'n v. Koracorp Industries, 575 F.2d 692 (9 th Cir. 1978), and it is endorsed in North Dakota through the principle that, "We view the evidence in the light most favorable to ... the party who opposed the motion for summary judgment.". Johnson Farms, supra. Furthermore, the Appellants have raised "specific bases "for impeaching Cordes'.affidavit. Cordes'.recollection of the settlement was very bad:

MR. WILCOX: Does that refresh your recollection at all about what was agreed to?

MR. CORDES: No. I mean, my recollection is we got about 38 in cash, but not 46, but I may be wrong, or maybe I left $10 million on the table. I don 't know.

If Cordes'.recollection of the settlement was so poor that he couldn 't even remember whether he had "left $10 million on the table,".his affidavit about the settlement lacks credibility. Further, Cordes'.affidavit is inconsistent with the sworn testimony of Ronald Tipton of Montana-Dakota Utilities Company:

MR. KUNTZ: Did you believe that WBI was settling for all the gas volumes or just 25% of the gas volumes?

MR. TIPTON: Everything. All the gas volumes... I paid for all the gas. I settled the contract in its entirety.

Therefore, as an alternative ground for denying summary judgment, there is a disputed issue regarding whether Koch was only being paid for its 25% interest, so summary judgment should be denied.

Moreover, beyond these issues of credibility, North Dakota law gives broad effect to the term "proceeds.". In the context of secured transactions, for example, proceeds include whatever is received upon the sale, exchange or other disposition of collateral. In re Kingsley, 865 F.2d 975 (8 th Cir. 1989) (citing N.D.C.C. Section 41-09-27(1)). Proceeds clauses in oil and gas leases entitle the royalty owner to all money obtained from the sale of oil and gas and may also include other types of tangible, non-monetary consideration. Sondrol v. Placid Oil Co., 23 F.3d 1341 (8 th Cir. 1994); Watts v. Atlantic Richfield, 115 F.3d 785 (10 th Cir. 1997). Koch sued MDU to recover the price differential on gas that it sold MDU on behalf of the producers, and part of the settlement was made to resolve those claims. And as Justice Neumann indicated by his questions, Koch should pay the Appellants their portion of what Koch received.

Finally, the Appellants wholeheartedly agree with Justice Neumann that it would be improper for this Court to deny gas producers, like the Appellants, the right to share in Koch 's settlement proceeds based on any

arguably adverse language that is contained in Koch v. MDU. If the Appellants were the "real party in interest,".the case should have been brought by them. See Federal Rule of Civil Procedure 17. If not, they should at least have been joined as necessary parties pursuant to Rule 19. If such a person cannot be joined, the court must determine in equity and good conscience whether the action should proceed. Neither Koch nor MDU sought to join the Appellants. Thus, the validity of Koch v. MDU is questionable. At the very least the Appellants'.claims were not litigated in Koch v. MDU, and it would be improper for this Court to apply any adverse precedent against them.

Furthermore, the language from Koch v. MDU which Koch contends is adverse is:

If the gas was not sold, Koch did not owe the producers their cut; if Koch did sell to other customers the gas that MDU contracted to buy, Koch presumably paid the producers the appropriate percentage from those proceeds, and the producers would have no further recourse against Koch. (emphasis added.) Therefore, the Eighth Circuit 's language is also inherently conditional, because it uses the terms "if".and "presumably.".Accordingly, at most the Eighth Circuit was posing a hypothetical. And even if it wasn 't, Koch v. MDU was decided on March 15, 1993, which several months before the Settlement Agreement between Koch and MDU, so the Eighth Circuit 's language couldn 't possibly have addressed whether the Appellants have any contractual or other claims against Koch as the result of the subsequent Settlement Agreement.

D. The Trial Court Also Erred by Granting Summary Judgment on the Appellants'.Claims that Koch Breached its Contracts and Failed to Implement The Contracts in Good Faith by Settling.

E. The Appellants have established above that if Koch had honored its written commitment to keep them apprised of major developments, they would have independently sued or intervened and precluded a settlement which was unfavorable to them. For this reason alone, summary judgment should not have been granted on the claims.

F. In addition, the summary judgment decisions do not take into account the specific provisions contained in the ninety Koch contracts, which is another fatal error. Moreover, the Settlement Agreement was plainly a violation of those contracts. For example, one of the contracts is between Appellant Sinclair and Koch dated August 1, 1986 "Koch is defined as "Processor,".and Sinclair is defined as "Producer.". The contract specifies that, "Processor shall exert diligent and good faith efforts to sell all of Producer 's Plant Output of Residue Gas to WBI (as Processor does with respect to all producers on its system.)". However, notwithstanding this provision, Koch agreed to a buyout and termination of the contracts by which Koch resold Sinclair 's and the other Appellants'.gas to WBI. Therefore, by entering into the settlement, Koch was violating specific provisions of its contracts. For this reason as well, summary judgment should be reversed.

G. At the oral argument in Apache, Justice Neumann additionally suggested that Koch may not have entered into the settlement in good faith:

H. JUSTICE NEUMANN: Did Koch- at one point in your brief you talk about an implied covenant of fair dealing on all contracts in North Dakota. And leaving aside the fact that I don 't think this Court has ever said that that covenant applies in all contracts in North Dakota, if there is such a covenant, it would not have run between your

clients and MDU; it would have run between your clients and Koch?

I. MR. RATHERT: That is correct.

J. JUSTICE NEUMANN: Shouldn 't this lawsuit be against Koch for failure to settle for a hundred percent? The threshold issue, therefore, is whether Koch owes Appellants a duty of good faith. That apparently depends in part on whether the Koch contracts are for the sale of "goods " within the meaning of the Uniform Commercial Code ("UCC "). If they are, there is a "duty of good faith".in the performance of the contracts under N.D.C.C. Section 41-01-13. Koch is plainly a "merchant,".because its contracts show that Koch "deals in goods of the kind".involved here and holds itself out as having knowledge or skill peculiar to the goods involved. See N.D.C.C. Section 41-02-04. "Good faith".is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.". See N.D.C.C. Section 41-02-03.

K. The Appellants maintain that their "Gas Purchase Contracts".with Koch are contracts for the sale of goods, but that their Koch "Gas Processing Agreements".are not. Koch contends that both are governed by the UCC. Therefore, the parties agree that the duty of good faith applies to the "Gas Purchase Contracts,".and it is disputed whether it additionally applies to the "Gas Processing Agreements.".The trial court determined that Contract MCK-1590 is subject to the UCC, even though it is a "Gas Processing Agreement.". The Appellants dispute this at Part 5, infra. However, unless this determination is reversed, the requirement of good faith apparently applies to all of the Appellants'.contracts with Koch, and a duty of good faith applies without exception.

L. The purpose of the good faith requirement was examined in Racine v. American International Adjustment Co., Inc., 980 F. Supp. 745 (D.Vt. 1997): An underlying principle implied in every contract is that each party promises not to do anything to undermine or destroy the other 's right to receive the benefits of the agreement. The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Koch was accordingly required to act in a manner which was consistent with the purposes of the contracts and protected the Appellants'.reasonable expectations. See Oil Express National, Inc. v. Burgstone, 958 F. Supp. 366, 369 (N.D. Ill. 1997); Howtek, Inc. v. Relisys, 958 F. Supp. 46, 48 (D. N.H. 1997). Moreover, Koch 's failure to perform its contracts with the Appellants is an issue of fact which should not be determined on summary judgment. Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 72 F.3d 190, 199 (1 st Cir. 1995); Amoco Oil Co. v. Ervin, 908 P.2d 493, 499 (Colo. 1995); Brock v. Douglas Kohoutek, L.P., 483 S.E.2d 342, 346 (Ga.App. 1997). To briefly summarize, Koch first agreed not to sue MDU but to pass MDU 's price reductions through to the gas producers if MDU would keep Koch whole. Then, when Koch eventually did sue MDU, it promised in writing to keep the Appellants apprised of major developments but failed to do so, presumably so it could exercise complete control over a potential settlement. Koch then entered into a highly unfavorable settlement with MDU, under which it received and retained approximately $50 million, terminated the Phillips Contract and nevertheless continued to sell its own gas to MDU, but paid the gas producers nothing. At the very

least, these facts give rise to a disputed issue of fact regarding whether Koch implemented its contracts with the Appellants in good faith. Furthermore, the Appellants'.expert witness, has reviewed Koch 's actions and has determined that they are inconsistent with "reasonable commercial standards of fair dealing in the trade".and are therefore contrary to the contractual duty of good faith. Therefore, at a minimum, the Appellants have raised a disputed fact issue precluding summary judgment.

E. The Trial Court Additionally Erred by Granting Summary Judgment on the Appellants'.Unjust Enrichment Claim Against Koch. The Appellants alternatively sued Koch in unjust enrichment, and the trial court granted summary judgment, finding that those claims were barred under JN Exploration; Prod. v. Western Gas Resources, Inc., 153 F.3d 906, 910 (8 th Cir. 1998) and Estate of Hill, supra ., because the Appellants have "direct, written contracts with Koch.". JN sold gas to Western, which it resold to MDU. Western and MDU had a dispute and settled it. JN sued to recover part of the settlement. The Eighth Circuit stated: Most importantly, as discussed above, the jurisprudence of the Supreme Court of North Dakota forecloses relief on claims for unjust enrichment in the face of an express contract. While the Supreme Court of North Dakota may see fit to carve out exceptions to its rule, we decline to do so here.... However, in footnote 5 to the JN decision, the Eighth Circuit openly acknowledged that there are three conflicting North Dakota Supreme Court decisions (Cargill, Inc. v. Kavanaugh, 228 N.W.2d 133 (N.D. 1975); Fiebiger v. Fischer, 279 N.W.2d 406 (N.D. 1979); and Trauger v. Helm Bros., Inc., 279 N.W.2d 1979). Moreover, as demonstrated by Apache, this Court refers to Dobbs in determining the law of unjust enrichment, and Dobbs states the opposite: Restitution #173; recovery of

benefits conferred #173; is permitted to prevent unjust enrichment. Restitution is an important remedy in connection with contracting. Sometimes, because of the way "benefit".is defined in practice, decisions ostensibly based on "restitution".may operate in fact to fill gaps in the parties'.bargain .... Dobbs at 793 (emphasis added). Thus, the restitutionary principle which the Eighth Circuit applied in JN is incorrect. Furthermore, it is contrary to the law of North Dakota. Not only do the three decisions that the Eighth Circuit explicitly acknowledged hold the opposite. It is also plainly the law in North Dakota that the plaintiff may recover in unjust enrichment, even if he has a remedy at law, if equity would provide more perfect and complete justice. Graven v. Backus, 163 N.W.2d 320, 327 (N.D. 1968); D.C. Trautman Co. v. Fargo Excavating Co., Inc., supra ; A & A Building Materials v. I-S Inc., 274 N.W.2d 183, 188 (N.D. 1978). Further, the Eighth Circuit bases its decision in JN on Estate of Hill. However, footnote 3 in that case expressly endorses the principle that the existence of a contract does not preclude an action in unjust enrichment if the equitable remedy is better suited to provide perfect and complete justice. Thus, the authorities which the trial court relied upon to grant summary judgment on the Appellants'.unjust enrichment claim against Koch do not support it, and both Dobbs and North Dakota law are both opposed. The Appellants brought this case seeking to be reimbursed for their economic losses by either Koch or MDU, or by a combination of both of them. At this point it is unclear whether Appellants'.other claims will suffice to remedy their economic losses. Until that is determined, an unjust enrichment claim against Koch should remain an option, so the trial court 's grant of summary judgment on that claim should also be reversed.

4. THE TRIAL COURT ALSO ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON THE

APPELLANTS'.CLAIMS AGAINST KOCH FOR AN ACCOUNTING CONCERNING LIQUEFIABLE HYDROCARBONS.

The trial court 's Order granting summary judgment on the Appellants'.claim for a liquefiable hydrocarbons accounting from Koch is also unsupportable. The Appellants are entitled to be paid for their liquefiable hydrocarbons under their percentage-of-proceeds and similar contracts with Koch, much like they are for the residue gas. The Appellants ' contracts are generally with Koch Hydrocarbon Company ("KHC "), a Division of Koch Industries, Inc. Koch Industries, Inc. is one of the largest privately owned companies in America, consisting of over one hundred companies and divisions. However, KHC is not separately incorporated and is, therefore, not a recognized legal entity. Consequently, the Appellants'.contracts were with the legal entity, Koch Industries, Inc. Moreover, Koch 's field personnel for the McKenzie plant worked for different Koch companies and didn 't even account separately for their time. Further, the separate nature of the Koch entities was so unimportant that sometimes a Koch entity which was providing services to another one actually paid for the services it was providing rather than the other way around, which would not occur in an arms-length or third party transaction.

Koch generally engaged in a web of interaffiliate transactions regarding the liquefiable hydrocarbons, and Koch often based the amounts it paid the Appellants on the amounts being paid in these interaffiliate transfers instead of third party transactions. For example, Koch considered it to be a sale when it transferred liquids between the "natural gas processing group".and the "gas liquids group".within KHC. These are merely transfers within divisions or departments within an operating division of a corporation.

Further, a substantial amount of the liquids were transferred to Koch Hydrocarbon Canada, and no such entity even exists. However, Koch paid the Appellants based on internal transfer values that it assigned to these transfers. Furthermore, the Appellants were paid far than the market value for their products pursuant to these transactions. Even though discovery has not been completed, the Appellants were also able to identify several other specific examples. Because Appellants'.contracts with Koch generally contain percentage-of-proceeds or similar provisions, Koch reduces the gross transfer price for the liquefiable hydrocarbons by certain "costs,".which it claims it has incurred. However, instead of limiting reductions to specific costs that are set forth in the contracts, Koch has been also deducting an interaffiliate profit margin, which is not even a "cost. "The State of North Dakota challenged this deduction when it conducted a tax audit, so Koch "whited out".the word "Margin".on some of its accounting records and wrote over it "Fractionation and Marketing Fee. "However, the liquids division which collected the amount continued to characterize it as a "margin".on other accounting records. (The Appellants contend that Koch did this fraudulently and in bad faith in order to try to conceal an interaffiliate profit margin which Koch was improperly treating as a "cost".in paying gas producers for liquefiable hydrocarbons. At the very least, Koch 's actions give rise to fact issues precluding summary judgment. Several other specific examples of Koch 's breaches of contract regarding liquefiable hydrocarbons are described in the Affidavit of Appellants'.expert, which is attached as Exhibit 20, and supporting evidence is identified by example. The reason that the trial court gave in its July 3 Memorandum Decision for granting summary judgment on this issue was erroneous, because the liquefiable hydrocarbons were not addressed in Apache. The Appellees'.proposed Order, which the trial court later

adopted, tried to justify the trial court 's earlier decision on the grounds that the Appellants hadn 't specified which of the Appellants were underpaid, which specific contract terms Koch was alleged to have breached, and the time periods and amounts of Appellants ' claims.

As discussed in Part 8, infra, the trial court has never established a discovery cutoff in this case, and the Appellants have not yet completed their discovery. With respect to liquefiable hydrocarbons, the Appellants had filed a Motion to Compel and for Sanctions against Koch, because the Appellants had noticed a Corporate Representative deposition, but Koch had stonewalled the Appellants'.discovery requests by producing a Corporate Representative who was not knowledgeable on the subjects noticed, and Koch had refused to reveal how it had ultimately disposed of the liquefiable hydrocarbons and what it had received for them. In addition, the trial court 's later rationale basis for granting summary judgment has no merit. When, as here, a party has sued for an accounting, that is because damages are not susceptible to being readily proven. The Appellants cannot precisely calculate their damages until Koch tells them such things as how Koch actually disposed of the liquefiable hydrocarbons in third party transactions. However, Appellants'.expert provided estimates based on the available data. Koch likewise hasn 't cited any authority for this Court to affirm a grant of summary judgment just because the Appellants haven 't provided Koch with a specific listing of the particular Appellants which are pursuing this claim. In the First Amended Complaint the Appellants stated that "a number of the Plaintiffs, including Exxon".were suing for an accounting. Koch never filed a motion for a more definite statement under Rule 12(e) to learn the names, nor did it submit a discovery request seeking this information, but it is a fair reading of the summary judgment pleadings and evidence that Exxon and all the other Appellants have been pursuing the claim.

Moreover, Exxon has been specifically named since the outset, so it was especially wrong to use this rationale to grant summary judgment against it. Next, it is not a requirement that the Appellants specifically state the time periods for which they are seeking damages to avoid summary judgment. As in virtually all cases, the Appellants are seeking damages for the entire period covered by the statute of limitations, which is a disputed issue. Finally, Koch contends that summary judgment should be entered against the Appellants, because they haven 't explained how each of Koch 's disputed actions violate each term of the ninety contracts at issue. This would be an enormous task, because each contract often totals fifty pages or more, and Koch has not referenced any authority which requires it. However, the Appellants'.expert has described the types of provisions in the Koch contracts, and based on the information provided to date, how Koch violated them. Among other things the expert detailed that Koch paid the Appellants on the basis of interaffiliate transfer prices, sometimes with entities that don 't even exist, and that those prices don 't reflect market values. He also identified supporting documentation by example. This alone is sufficient to defeat summary judgment. <p> In short, the Appellants cannot be expected to have all the details in a case where they have sued for an accounting, especially where Koch has stonewalled their discovery. The Appellants are entitled to all reasonable inferences in opposing summary judgment, and the trial court 's decision concerning liquefiable hydrocarbons should additionally be reversed.

5. THE TRIAL COURT ADDITIONALLY ERRED IN DETERMINING THE STATUTE OF LIMITATIONS.

There are two discrete statute of limitations issues: (1) the statute of limitations which applies to Contract MCK-1590; and (2) when Exxon asserted its treating fee

claim for purposes of the statute of limitations. The Appellants will address them in turn.

The trial court determined that Koch had breached Contract MCK-1590 by incorrectly calculating the "treating fees".it charged Exxon. It then had to determine the statute of limitations. It found that the statute of limitations which applies is the four-year statute provided under N.D.C.C. Section 41-02-104, which governs contracts for the sale of goods under the UCC. The Appellants contend instead that the six-year statute of limitations which is applicable to non-UCC contracts under N.D.C.C. Section 28-01-16 applies, because the parties expressly agreed that Contract MCK-1590 is a "Gas Processing Agreement,".and it is thus primarily a contract for services not for goods.

The simple, obvious, and direct answer is the one which is most favorable to Exxon. The parties collectively have only identified one case which expressly addresses whether a "Gas Processing Agreement".is a contract for the sale of goods, Northern Natural Gas Co. v. Conoco Inc., 986 S.W.2d 603 (Tex. 1998). Further, Northern Natural holds that a "Gas Processing Agreement".is not governed by the U.C.C. Moreover, it has long been this Court 's policy that if there is even a question of which statute of limitations applies, the longer term is applicable. See, e.g. In the Interest of W.M.V., 268 N.W.2d 781 (N.D. 1978) ("Our holding... is in accord with the policy we have previously stated in North Dakota that if there is a question of which statute of limitations applies, the longer term applies. "). See also Sprechter v. Magstadt, 213 N.W.2d 881 (N.D. 1973), and Adams v. Little Missouri Minerals Ass 'n, 143 N.W.2d 659 (N.D. 1966). There is a good reason to apply this rule, because the purpose of a statute of limitations is to provide a plaintiff with a reasonable time to assert his claim. See Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986); 51 Am Jur 2d Limitations

of Actions, Section 17 and 54 C.J.S. Limitation of Actions at 17. If it is uncertain what the statute of limitations applies and the plaintiff errs, it is inappropriate to punish the plaintiff.

However, in further support of its position, Exxon attached copies of Contract MCK-1590 and Contract MCK-845, which is a "Gas Purchase Contract,".and it compared them side-by-side. Contract MCK-1590 is expressly described on both its cover and its first page as a "Gas Processing Agreement,".the contracting parties are identified as "Producer,".and "Processor,".it never refers to the Producer "selling".its gas to the Processor, but it repeatedly refers to the Processor processing the Producer 's gas (See, e.g., Section 1.2, which states that, "Producer hereby assigns to Processor the exclusive right to process all of the gas produced from Said Lands and dedicated hereunder.... ") Further, Contract MCK-1590 has a so-called "take-in-kind".provision, which give the producer the option to have its gas processed and to take the large majority of its products and dispose of them itself. In contrast, Contract MCK-845 is expressly designated on both the cover page and the first page as a "Gas Purchase Contract,".and the parties are identified as the "Seller".and the "Buyer.". Moreover, the very first paragraph of Contract MCK-845 expressly states that the Seller is selling and the Buyer is buying ("For and in consideration of the mutual covenants contained herein, the Seller agrees to sell and the Buyer agrees to purchase from Seller, natural gas.... ") There is also no reference in

Contract MCK-845 to the Buyer processing any gas which is subject to the contract. To the contrary, Contract MCK-845 states that, "Upon delivery, title to the gas and all components thereof shall pass to and vest in Buyer without regard to the purposes for which it may thereafter be sold or used by Buyer. ") (emphasis

added.) And there are no take-in-kind rights. Thus, the parties expressly agreed that Contract MCK-1590 is a "Gas Processing Agreement,".and it is very different from a "Gas Purchase Contract,".like Contract MCK-845. Whether an agreement is a contract for the sale of goods or for services, such as gas processing, is determined by the language of the agreement itself. Nitrin, Inc. v. Bethelem Steel Corp., 35 Ill.App.3d 577 (1976). Moreover, the Eighth Circuit has applied the same test. Bonebrake v. Cox, 499 F.2d 951 (8 thCir. 1974). ("The applicability of the Code to the April contract is clear from and within its four corners. ") The courts also consider how the parties are denominated in their contracts and how their contractual obligations are described. Here, there can be no doubt that Contract MCK-1590 is exactly what it says it is a "Gas Processing Agreement.

"Notwithstanding all of the above, the trial court stated: I find more similarities between the JN case and probably any of the other ones, so I 'm going to adopt-- I don 't know if it would be binding on this Court, but at least it 's compelling authority to the extent to adopt that determination. This conclusion was erroneous. The contract between the producer and the gas plant operator in JN was clearly a "Gas Purchase Contract," like Contract MCK-845. ("... JN 's predecessor-in-interest entered into a gas sales and purchase contract with Western. Pursuant to this contract, JN agreed to sell, and Western agreed to buy, "all the gas... now or hereafter produced from the said lease/s and land/s".through 1999.") 153 F.3d 908. (emphasis added). The JN decision also does not indicate that the parties to the contract were described as the "Producer" and the "Processor," or that the producer had take-in-kind rights. Koch also asserted that, "Northern Natural owned the gas going into Conoco 's processing plant and owned the gas coming out of that plant. Conoco never bought the Northern Natural gas." However, there is nothing in the

Northern Natural decision which says this, so it is speculation, and since it was not stated in the decision, it was plainly not the basis for the ruling which was made. And even if it had been, at least "a question" would have been presented regarding which statute of limitations applies, so the longer limitations period is applicable pursuant to this Court 's policy. The second error that the trial court made was its determination of when Exxon asserted its claim for purposes of deciding when the statute of limitations period ended. A party asserts a claim for purposes of the statute of limitations when he files his motion to intervene. U.S. for Use and Benefit of *Canion v. Randall*; *Blake*, 817 F.2d 1188 1987). Exxon was not one of the original Plaintiffs, but it intervened. N.D.R.Civ. Pro. 24 governs interventions and provides that the person seeking to intervene should file a motion stating grounds for the intervention, which must be "accompanied by a pleading setting forth the claim or defense for which intervention is sought.". Here, Exxon filed its motion to intervene along with a Complaint raising the treating fee issue on June 30, 1997, and the Court granted it on July 18, 1997. Further, the Court 's Order stated that beginning on July 18, 1997, Exxon would be included in this case as a plaintiff ("It is the Order of this Court that Exxon Corporation shall be added as a party Plaintiff to these proceedings and the caption of this case shall henceforth include the name of Exxon Corporation as a party Plaintiff.") thus, Exxon should be determined to have asserted its treating fee claim on June 30, 1997, or on July 18, 1997 at the very latest. Alternatively, N.D.C.C. Section 28-01-38 provides that, "An action is commenced as to each defendant when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him.". There is no requirement that a summons be issued in the case of interventions, and the only summons in this case was issued when the case was filed on March 14, 1997. Therefore,

alternatively, Exxon 's intervention relates back to and should be deemed commenced on March 14, 1997. In the March 5, 2001 Judgment, however, the trial court instead found that Exxon had filed its claim when the Plaintiffs had subsequently filed a Motion for Leave to submit their First Amended Complaint, which was on September 3, 1997. At the October 23, 2001 hearing, the trial court explained its decision as follows: As far as when the amendment #173; or when it would relate to, I 'm going back to the motion that was in September of 1997 that squarely put that issue before the Court because at that point I think that everyone was on notice that Exxon was making this claim at that point. This ruling by the trial court was also clearly in error. A comparison of the Complaint that Exxon filed on June 30, 1997 with the First Amended Complaint, shows that they are identical, except for numbering. Thus, contrary to the trial court 's determination, everyone was fully aware of the nature of Exxon 's claim on June 30, 1997. FURTHER, THE TRIAL COURT ADDITIONALLY ERRED WHEN IT DENIED THE APPELLANTS'.MOTION TO FILE THEIR SECOND AMENDED COMPLAINT. The Appellants are also appealing the trial court 's denial of their Motion for Leave to File a Second Amended Complaint in four respects: (1) as discussed above, the Appellants sought to clarify that if Koch had kept them apprised of "major developments,".they would have sought to intervene or take other appropriate action; (2) the Appellants allege that they had a "special relationship" with Koch; (3) they allege that MDU tortiously interfered with their Koch contracts in connection with the 1993 settlement; and (4) they allege a civil conspiracy that Koch and MDU improperly sought to structure the settlement to the detriment of the other affected parties, including the Appellants. The legal standards are well established. Rule 15(a) "demands that trial courts should be very liberal in allowing amendments in the interests of

justice.". *C.I.T.Corp. v. Hetland*, 143 N.W.2d 94, 101 (N.D. 1966). In order to successfully oppose a motion to amend a pleading, a party must show that through surprise caused by the amendment, the party was unable to prepare its case or that the party was otherwise prejudiced by the grant of permission to amend. *Vasichek v. Thorsen*, 271 N.W.2d 555 (N.D. 1978). Accordingly, this Court has affirmed a trial court 's decision to allow an amended pleading made many months after the original filing and even after trial had begun. *Bender v. Time Ins. Co.*, 286 NW.2d 489 (N.D. 1979); *CIT, supra* and *Vasichek, supra.* The Appellants have already addressed the intervention issue above. That proposed amendment did not prejudice Koch, because the Appellants had previously sued on the basis of the major developments letter, so Koch was generally aware of the claim. There are three issues to address concerning Appellants'.special relationship claim. The first is the proper application of *Bourgois v. Montana-Dakota Utilities Co.*, 466 N.W.2d 813 (N.D. 1991). Bourgois states that, "Constructive fraud arises from the breach of a duty which is owed ordinarily because of a fiduciary or confidential or other special relationship between the parties.".(emphasis added.) However, the word "ordinarily "doesn't mean "always," and this Court expressly stated that it makes exceptions to the "ordinary" rules where one of the parties had knowledge of facts which would not be discoverable by the other party through "the exercise of ordinary care and diligence." Here, the Appellants were not parties in *Koch v. MDU*. Therefore, they did not have ready access to all the filings and decisions. (The federal district court's decision was unpublished, and the Eighth Circuit's decision was not published until substantially after it was rendered.) In addition, Koch had committed in writing to keep the Appellants apprised of major developments and had dishonored that commitment. Therefore, this is exactly the kind of case in which one

would expect a party, in the words of this Court, "to relax the care and diligence (they) would ordinarily exercise, "so the Appellants properly pled a special relationship here. Second, Koch asserted that the Appellants did not have a "special relationship" with Koch in their Third Motion for Summary Judgment, and the Appellants disputed this in their February 22, 2000 response. Thus, Koch has been long aware of this issue, Koch had actually raised it, and Koch wasn't prejudiced by the proposed amendment. And third, Bourgois only applies to claims of constructive fraud, so irrespective of how this issue is decided, the Appellants'.claims of actual fraud and deceit stand. The Appellants also respectfully submit that the trial court erred when it declined to permit them to amend their Complaint to state their claims for tortious interference with contract and their related conspiracy claim. The trial court initially denied summary judgment to permit the Appellants to proceed with their discovery. The Appellants subsequently deposed Cordes, Tipton, Castleberry, and Lobel concerning the 1993 settlement. It was only after the Appellants had taken those depositions and had further analyzed the discovery documents that they moved to amend their Complaint to make these additional allegations. Cordes, Tipton, and Castleberry all agreed that during the settlement negotiations, Koch and MDU considered a wide range of numbers that would have assigned different values to Paragraphs 1-3, and they agreed on an allocation which enabled MDU to pass through more of its settlement payment than any other alternative. To quote Cordes: So this was of importance to WBI to allocate it, and it probably was not of great importance to us... [S]o it made no difference to us which way these numbers were allocated, and probably the function of that note is that we'd be willing to do anything with MDU that was reasonable; willing to work with them. prepared the numbers, and by MDU 's admission, they were not

necessarily even consistent with MDU 's own internal evaluation of the case. As just one example, the Eighth Circuit had reversed and remanded on the contract price under the McKenzie Contract, so it was subjective how much of the settlement to allocate to the price differential on past sales of gas (i.e., Paragraph 1), which necessarily impacted the allocations under Paragraphs 2 and 3. The agreed allocations enabled MDU to pass through the overwhelming majority of the settlement to its ratepayers. If the allocations had differed, MDU's private shareholders would have borne more of the cost. Therefore, Koch and MDU conspired. Koch agreed to defer to MDU on the allocations, they put some language in the Settlement Agreement to help Koch resist claims by gas producers to share in the settlement, and they agreed to terminate the Phillips Contract to the detriment of the gas producers, but also agreed that Koch could continue to sell its own gas to MDU. When all the wheeling and dealing was over, therefore, the conspirators benefitted, and the gas producers and ratepayers were stuck. Finally, the inclusion of these issues does not unduly prejudice the Appellees, because the settlement has been a focus since this case was filed, and they do not need to take any further discovery to address these claims. 7. THE TRIAL COURT ALSO ERRONEOUSLY DENIED THE APPELLANTS'.DISCOVERY AND SANCTIONS MOTIONS AS MOOT. Finally, the Appellants respectfully submit that the trial court erred in denying their discovery and sanction requests as moot. Because the trial court erroneously entered summary judgment against the Appellants, their discovery is not moot. Since the trial court has never set a discovery deadline, discovery should proceed. REQUEST FOR RELIEF The Appellants accordingly pray for the following relief: (1) the trial court 's grants of summary judgment in favor of the Appellees should be reversed; (2) the Court should grant summary judgment in favor of Exxon that a six-

year statute of limitations applies and that Exxon asserted its treating fee claim no later than June 30, 1997; (3) the Appellants'.Motion for Leave to File their Second Amended Complaint should be granted in full; and (4) the trial court 's denial of Appellants'.various Motions to Compel Discovery and for Sanctions should be reversed, and they should be granted. The Court should also order further that discovery in this case will proceed. To the extent that this Court addresses the issues, this will hopefully streamline trial and possibly facilitate a settlement. The Appellants note that after the trial court decided the treating fee issues, Exxon and Koch were able to agree on a damages amount in order to avoid an unnecessary trial, and they hope that this Court 's ruling on this appeal will lead to a similar outcome.

Respectfully submitted,

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I-1

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT COURT
STATE OF NORTH DAKOTA
COUNTY OF STARK

BTA OIL PRODUCERS, CENEX, INC.,CONOCO INC., EQUITABLE RESOURCES ENERGY COMPANY EXXON CORPORATION, MIDGARD ENERGY COMPANY, (FORMERLY KNOW AS MAXUS EXPLORATION COMPANY), SINCLAIR OIL CORPORATION, SUN OPERATING LIMITED PARTNERSHIP, TBI EXPLORATION, INC. (FORMERLY KNOWN AS PRESIDIO EXPLORATION, INC.), TIPPERARY OIL & GAS CORPORATION, AND TOM BROWN, INC.,

Plaintiffs,

vs.

MDU RESOURCES GROUP, INC. (FORMERLY KNOWN AS MONTANA-DAKOTA UTILITIES COMPANY), WILLISTON BASIN INTERSTATE PIPELINE COMPANY, INC., KOCH INDUSTRIES, INC., AND KOCH HYDROCARBONS COMPANY,

Defendants.

Civil No. 97C-08

SECOND AMENDED COMPLAINT

The plaintiffs BTA Oil Producers (hereinafter "BTA"), CENEX Harvest States Cooperatives (hereinafter "CENEX"), Conoco Inc. (hereinafter "Conoco"), Equitable Resources Energy Company nka Equitable Production Company (hereinafier "Equitable"), Exxon Mobil Corporation (hereinafter "Exxon"), Kerr-McGee Oil & Gas Onshore LP

(hereinafter "Kerr-McGee"), Midgard Energy Company (hereinafter "Midgard"), Sinclair Oil Corporation (hereinafter "Sinclair"), Tipperary Oil & Gas Corporation (hereinafter "Tipperary"), and Tom Brown, Inc. ("Tom Brown") as and for their cause of action against the defendants allege and state:

I.

BTA is a general partnership organized and existing under the laws of the state of Texas, having its principal place of business at 104 South Pecos, Midland, TX 79701.

II.

CENEX HARVEST STATES COOPERATIVES is a corporation organized and existing under the laws of the state of Minnesota, having its principal place of business at 5500 Cenex Drive, Inver Grove Heights, Minnesota 55077.

III.

Conoco is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 600 North Dairy-Ashford, Houston, TX 77210.

IV.

Equitable is a corporation organized and existing under the laws of the state of West Virginia, having its principal place of business at 301 Grant Street, Suite 3300, Pittsburgh, PA 15219.

V.

Exxon is a corporation organized and existing under the laws of the state of New Jersey, with its principal place of business in Texas. Its address for this action is: c/o Exxon Mobil Gas Marketing company, 800 Bell Street, Houston, TX 77002.

VI.

Kerr-McGee Oil & Gas Onshor LP is a limited partnership organized and existing under the laws of the state of Delaware, with its principal place of business at 1123 Robert S. Kerr, Kerr-McGee Center, Oklahoma City, OK 73125. It is the successor in interest to Sun Operating Limited Partnership following the merger of Oryx Energy Company into Kerr-MeGee Corporation.

VII.

Midgard is a corporation organized and existing under the laws of the state of Delaware, having its principal place of business at Town Center Two Building, 1330 Lake Robbins Drive, Suite 300, The Woodlands, Texas 77380.

VIII.

Sinclair is a corporation organized and existing under the laws of the state of Wyoming, having its principal place of business at East Lincoln Highway, Sinclair, Wyoming 82334.

IX.

Tipperary is a corporation organized and existing under the laws of the state of Texas, with its principal place of business at 633 Seventeenth Street, Suite 1550, Denver, CO 80202.

X.

Tom Brown is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business at *555* 17th Street, Suite 1850, Denver, CO 80202-3918. Presidio Exploration, Inc. became TBI Exploration, Inc., ("TBI") which was formerly a plaintiff in this case. TBI was a wholly owned affiliate of Tom Brown, and it has since become part of Tom Brown, which is continuing to pursue the Presidio/TBI claims, as well as its own.

XI.

MDU Resources Group, Inc. (hereinafter "MDU") is a corporation organized and existing under the laws of the state of Delaware, having its principal place of business at 200 North Third Street, Suite 300, Bismarck, North Dakota. MDU was formerly known as, or is the successor to Montana-Dakota Utilities Company.

XII.

Williston Basin Interstate Pipeline Company (hereinafter "WBI") is currently a subsidiary of Centennial Energy Holdings, Inc., which in turn is a subsidiary of MDU Resources Group, Inc. WBI is a corporation organized and existing under the laws of the state of Delaware, having its principal place of business at 200 North Third Street, Suite 300, Bismarck, North Dakota.

XIII.

Koch Hydrocarbon Company is an operating division of Koch Industries, Inc., a corporation organized and existing under the laws of Kansas, having its principal place of business at 4111 East 37th St. North, Wichita, Kansas (hereinafter collectively "Koch").

FIRST CLAIM
(UNJUST ENRICHMENT)

XIV.

At all relevant times the plaintiffs have produced natural gas in western North Dakota and northeastern Montana. They have sold their gas to Koch, or have contracted to have their gas "processed" by Koch. Upon information and belief, Koch sold the facilities through which the gas has been processed to Bear Paw Energy, Inc. effective December 20, 1996.

XV.

When natural gas is gathered and processed, liquefiable hydrocarbons (such as propane and butane) including condensate, are removed from the gas. The remaining processed or "residue gas" is then sold. Under their contracts with Koch, the plaintiffs have been entitled to be paid prices determined based on the amount received by Koch in the resale of their gas, which includes revenues attributable to Koch's sale of the processed gas. The percentage varies, but it is typically in the range of 75 percent.

XVI.

Koch has entered into or acquired a number of contracts with MDU and WBI to sell residue gas attributable to plaintiffs' production.

XVII.

MDU and WBI breached their contracts with Koch by failing to purchase all the gas covered by the contracts, by failing to pay the contract price, and by purporting to repudiate the contracts. A number of the plaintiffs shut in their wells or otherwise curtailed their production of gas as the result of these acts.

XVIII.

On or about January 20, 1987, Koch sued MDU and WBI with respect to these matters in the Federal District Court for the District of North Dakota, Southwest Division. In that action Koch sought to recover all the damages incurred under its contracts with MDU and WBI, because Koch was the seller of the gas under those contracts, since Koch had delivered and attempted to sell MDU and WBI all the gas attributable to the producers of gas behind the plant (including plaintiffs), and because Koch was due all payments for the gas to be sold to MDU and WBI under the contracts.

XIX.

On or about October 25.1991. Judge Conmy issued a Memorandum and Order, in which he found that MDU and WBI had breached the contracts and ordered judgment against the defendants jointly and severally in the principal mount of $31,990,300. In reaching this figure, Judge Conmy took notice of the fact that Koch typically paid 75 percent of the proceeds attributable to sale of the processed gas to the producers of that gas, and he generally reduced Koch's damages by 75 percent on the basis that Koch didn't sustain 75 percent of the economic loss attributable to MDU's and WBI's conduct. Judge Conmy expressly stated in an April 15, 1996 Memorandum and Order in JN-Exploration & Production v. Western Gas Resources, Inc. that his reduction in Koch's claimed damages was consistent with the unjust enrichment theory." The October 25, 1991 Memorandum and Order in the case between Koch and MDU was not published.

XX.

Judge Conmy's decision was appealed to the U.S. Court of Appeals for the Eighth Circuit, which rendered its decision in that case on March 15, 1993. That decision was subsequently reported at 988 F.2d 1529. In in decision the Eighth Circuit specifically pointed out that, "Counsel for MDU and Koch conceded at oral argument that there really is no question here of liability for breach of contract." 988 F.2d at 1533. The Circuit Court went on to affirm Judge Conmy's decision that Koch should only generally be allowed to recover 25 percent of the total damages, leaving 75 percent of the total damages unrecovered. The Eighth Circuit indicated that if the producers of gas processed by or sold to Koch had intervened in the lawsuit, they would additionally have recovered. 988 F.2d 1547. The Eighth Circuit also remanded the case back to Judge Conmy for further consideration of other issues, including the contract price.

XXI.

After the remand, on or about August 11, 1993, Koch and WB1 entered into a settlement and release of the claims that had been the subject of the litigation described above. The amount of the settlement was $40,000,000 paid to Koch in cash, and the transfer to Koch of numerous gas gathering assets with a book value of $10,445,226.34.

XXII.

Upon information and belief, neither MDU nor WBI has disgorged any part of the unrecovered contract damages to any of the producers; they certainly have not done so to the plaintiiffs. Therefore, a large part of the total damages apparently remain in the hands of WBI and MDU, even though: (1) Judge Conmy found that WBI and MDU had breached the contracts in question; (2) WBI and MDU "conceded" the issue of liability to the Eighth Circuit; and (3) WBI and MDU are therefore certainly wrongdoers.

XXIII.

Neither Koch, MDU, nor WBI sought to join plaintiffs to the District Court action. Most of the plaintiffs were not even familiar with the District Court or the Eighth Circuit decisions until 1996. Plaintiffs believe that Koch represented to the producers that it had contracted to sell their gas to MDU/WBI, that MDU/Koch were purchasing less than the required quantity of gas, and that they were paying less than the contract price. Koch also represented to the producers that it had entered into a partial settlement with MDU/WBI for a past period and would shortly be remitting to them their shares of the settlement payment. (Plaintiffs believe that Koch went on to pay some of the proceeds of the partial settlement to number of the plaintiffs, thereby confirming that it was recovering on their behalf). Koch additionally represented to the producers that it was pursuing the remaining outstanding issues in court, and it committed to inform the producers of "any major developments" in that case. Koch should have

done so irrespective of any explicit commitment, due to the relationships between the parties.

XXIV.

By any proper measure, Judge Conmy's Memorandum and Order, the Eighth Circuit decision, and the settlement which was finally reached are all "major developments." Furthermore, the determinations embodied in these orders and settlements, including but not limited to the fact that Koch was unable to recover with respect to the producer's share of production, are themselves "major developments". Moreover, Koch generally communicated with the plaintiffs in writing each month regarding their gas, However, Koch did not inform plaintiffs of any of the developments. As part of the settlement, Koch chose, in effect, to end its efforts to pursue unrecovered contract damages from MDU/WBI, and to sell out its existing contracts with MDU/WBI, but it never even informed the plaintiffs of those decisions, which were also "major developments". Upon information and belief, plaintiffs' claims in this case were fraudulently concealed from them.

XXV.

Any and all conditions precedent to recovery in this case have been performed or have occurred.

XXVI.

For the reasons stated above, MDU and WBI have wrongfully profitcd from their breaches of contract, and a positive benefit has wrongly been conferred upon them and their shareholders.

XXVII.

There is a total absence of justification for the unjust enrichment of MDU and WBI with respect to the contracts, and it would be inequitable for them to profit or enrich

themselves at the expense of producers of natural gas that delivered their gas to Koch, including plaintiffs.

XXVIII.

Even though there is no direct contract between plaintiffs and MDU and WBI with respect to these matters, in North Dakota a contract will be implied by law to do justice and prevent this unjust enrichment.

As a result of the unjustified and wrongful actions of MDU and WBI in enriching themselves at the expense of others, plaintiffs should be entitled to recover damages whichinclude, but are not limited to, the value of their gas based on the contracts between Koch and MDU/WBI, along with lost revenues attributable to gas production that was curtailed, and prospective profits and costs as shown to the Court.

XXX.

The issues involved in determining the claims or the mounts due plaintiffs are complex because of the numerous issues involved including price, quantity, and gas which was placed into and removed from storage (i.e. gas that Koch delivered to MDU and WBI under its contracts with them, but that MDU and WBI refused to pay for at the times required under the contracts).

XXXI.

The nature of the transactions is such that by reason of their complexity the amount due plaintiffs cannot be accurately ascertained without an accounting.

SECOND CLAIM
(IMPLIED TRUST)

XXXII.

Plaintiffs hereby allege and incorporate by reference paragraphs I trough XXXI, above.

XXXIII.

MDU and WBI have not paid to plaintiffs the damages set forth in paragraph XXX, above. Therefore, those sums are held by MDU and WBI in an implied trust which has been created by operation of law pursuant to the provisions of sections 59-01-05 and 06 N.D.C.C. and the other provisions of Title 59 N.D.C.C.

XXXIV.

Plaintiffs axe the beneficiaries of this implied trust and should be paid these amounts as damages as soon as they have been determined.

THIRD CLAIM
(BREACH OF CONTRACT AND UNJUST ENRICHMENT)

XXXV

Plaintiffs hereby allege and incorporate by reference the allegations contained in Paragraphs I through XXKIV, above.

XXXVI.

Under North Dakota law there is an obligation of good faith in the performance of plaintiffs' contracts with Koch. Koch breached those contracts and has failed to perform them in good faith in several respects including, but not limited to, the following. First, it is generally not expected that a defendant will agree to settle a case on appeal for an amount which significantly exceeds the amount of the underlying judgment. Here, however, Koch received considerations in resolution of this dispute which exceed in value 150% of

Judge Conmy's judgment, and it has not paid any of these considerations to the plaintiffs. It was improper for Koch to have reached this settlement, received these considerations, and not to have shared them with the plaintiffs. This constituted breach of contact and/or unjust enrichment, the latter in accordance with the reasoning and authorities incorporated in Judge Conmy's April 15, 1966 Memorandum and Order in JN Exploration & Production v. Western Gas Resources, Inc, A1-93-53 and A1-93-60

XXXVII.

Second, the contracts which were the subject of the lawsuit between Koch and WBI/MDU covered terms of as long as twenty years and contained gas prices that have exceeded prices that would otherwise apply. Under their contracts with Koch, the gas producers including the plaintiffs were to receive the economic benefit of approximately 75% of these prices. Instead, Koch received more than $13 million from WBI in consideration for terminating those contracts as of October 1, 1993. As a result the residue gas attributable to plaintiffs' production was no longer eligible to be sold to WBI, and it had to be disposed of differently. Practically speaking, this has meant at far lower prices, resulting in commensurately lower payments to plaintiffs. Koch breached its contracts with the plaintiffs and did not implement those contracts in good faith by agreeing to a buyout of existing contracts and by not sharing the moneys and other consideration received by Koch with the plaintiffs. Furthermore, Koch continued to sell substantial volumes of its own gas to MDU and its subsidiaries, (1) so in substance it received and kept dollars which were primarily attributable to the producers' gas; and (2) it continued to sell its own gas to MDU as well. Thus, Koch cashed in on the existing contracts (which principally benefitted third parties such as the plaintiffs economically), and it continued to sell its own gas to MDU as well. Alternatively, Koch has been unjust enriched in accordance with the reasoning and authorities incorporated in Judge Conmy's April 15, 1996 memorandum and order in *JN*

XXXVIII.

Third, the mounts that Koch paid the plaintiffs with respect to their gas were reduced by certain costs that Koch claimed it incurred. One of those costs was a fee to "treat"' plaintiffs' gas. Koch unilaterally changed the method it previously used to calculate the treating fee for certain gas processed through the McKenzie plant, which was produced from the Big Stick Unit. The relevant contact, which is between Koch and plaintiff Exxon, is numbered MCK-1590, and it requires the treating fee to be calculated by the multiplication of certain amounts times molecular percentages and percents. Koch has instead begun to make this calculation by multiplying these same mounts times whole numbers instead of percentages and percents, which greatly increases the fee. The change was made both prospectively and retroactively. It is contrary to the contract, without contractual modification or authority, and directly in conflict with the long-established course of performance between the parties.

XXXIX.

Fourth, the prices that the plaintiffs have been entitled to receive from Koch for their gas are also based in pan on the amount that Koch received or should have received from the sale of liquefiable hydrocarbons removed or extracted from plaintiffs' gas and the costs associated with the extraction and disposition of the liquefiable hydrocarbons. The prices that Koch paid a number of Plaintiffs, including Exxon, for gas may bc less that what Exxon and others are entitled to receive due to the prices that Koch set for the liquefiable hydrocarbons and the related casts that Koch asserts it can charge them. The issues involved in determining the claims or the amounts due them with respect to the liquefiable hydrocarbons are complex because of numerous issues involved including The determination of the disposition of the

liquefiable hydrocarbons, their prices, and the costs which ate properly associated with their extraction and disposition. The nature of the transaction is such that by reason of their complexity the amounts due them cannot accurately be ascertained without an accounting.

FOURTH CLAIM
(ACTUAL AND CONSTRUCTIVE FRAUD AND DECEIT)

XXXX.

Plaintiffs hereby allege and incorporate by reference the allegations contained in Paragraphs I through XXXIX, above.

XXXXI.

As Koch has admitted in its Answer, it represented to the plaintiffs and their predecessors that it would keep them apprised of any major developments in its litigation against MDU/WBI. Koch made this representation either knowing that it was false when it was made, or making it in a manner not warranted by information then available to Koch. Koch had an obligation to honor this commitment that it made.

XXXXII.

Koch made this commitment with the intent to induce plaintiffs to rely on its representation. It thereby induced the plaintiffs to relax the care and vigilance which they would otherwise have exercised. If Koch somehow intended to honor this commitment when it made it. Koch did not advise the plaintiffs when it later determined that the representation previously made was false or incomplete. Koch also suppressed both the fact that it determined not to honor the commitment and the major developments which occurred. such as the district court and appeals court decisions, and the settlement between Koch and MDU/WBI. On the other hand, the plaintiffs relied on Koch to their detriment to honor its commitment to them by not earlier attempting to pursue many of the claims in this case. Further, Koch did not inform the

plaintiffs that it had abandoned its efforts to recover with respect to their interests (and attempted to sell out their interests) as part of the settlement. The plaintiffs contend that their claims here are timely, but if it is determined that some or all of them are not, they have been injured by Koch's conduct, by which Koch obtained an advantage over them, misleading them to their prejudice. The Plaintiffs have also been prejudiced, because if Koch had informed them of the major developments, they would have intervened in the *Koch v. MDU* case and would have recovered, irrespective of whether it is ultimately determined that they can properly pursue claims against MDU/WBI for unjust enrichment/implied trust. *See* 988 F.2d 1547. Although the Plaintiffs primarily contend that this conduct gives rise to a cause of action for fraud, they have included a nonexclusive list of their breach of contract claims in Count 111. Some of the facts staled above additionally and alternatively give rise to breach of contract claims against Koch.

FIFTH CLAIM
BREACH DUTY OWED PURSUANT TO SPECIAL RELATIONSHIP

XXXXIII.

The Plaintiffs hereby reallege and incorporate by reference the allegations stated in Paragraphs I-XXXXII, above.

XXXXIV.

The Plaintiffs have a special relationship with Koch, and Koch owes them duties associated with that relationship because of the existence of several combined factors which are present here. First, Koch had percentage of proceeds and similar gas sales and gas processing contracts with the Plaintiffs, by which the amounts that the Plaintiffs received depended on

Koch's disposition of the gas and liquids. Second, Koch sued MDU/WBI for damages relating to all the gas sold, including the gas attributable to the Plaintiffs, notwithstanding MDU/WBI's claim that Koch was not the "real party in interest" and that the gas producers such as the Plaintiffs were the ones who sustained any injury. Third, Koch recovered from MDU/WBI for an earlier period of time on behalf of the Plaintiffs and represented it was sharing the recovery with them. Fourth, Koch committed in writing to keep the Plaintiffs apprised of major developments in its lawsuit against MDU. Fifth, Koch had unequal access to information relating to the litigation due to its status as a party and the Plaintiffs' lack of party status. And sixth, due to the above, the Plaintiffs reasonably relaxed the diligence they would otherwise have had and relied on Koch to keep them informed. In short, therefore, Koch pursued allegations in its lawsuit against MDU indicating that it was seeking to recover damages on behalf of the plaintiffs, confirmed that it was doing so by writing to confirm that it would keep the plaintiffs informed of major developments in the case, yet Koch failed to keep the plaintiffs informed and settled with respect to their interests without advising them. Koch compounded the injury by refusing to share the settlement proceeds with them. Thus, the Plaintiffs were damaged by Koch's breaches of the duties owed to them in accordance with their special relationship with Koch.

SIXTH CLAIM
TORTIOUS INTERFERENCE WITH CONTRACTS

XXXXIV.

The plaintiffs incorporate by reference the allegations stated in Paragraphs I-XXXXIII, above.

XXXXV.

Koch sued MDU for all the damages attributable to its contracts to sell gas to MDU. This includes damages that the

plaintiffs were entitled to receive trader their percentage of proceeds and similar gas sales and gas processing contracts with Koch. The August 11, 1993 settlement agreement expressly provides in paragraph 4 that, "The amounts in paragraphs 1, 2, and 3 were calculated by giving effect to the terms of the Order of the District Court and by resolving to the parties' mutual satisfaction the issues remanded by the Circuit Court of Appeals to the District Court." Koch claims that this language shows that it and MDU agreed that the settlement payments were made only with respect to Koch' s equity interests in the gas (i.e., 25%). This is the basis on which Koch claims that it is not required to share the payments with the plaintiffs.

XXXXVI.

Koch's claim should be determined to be wrong, and Koch should be required to share the settlement payments with the plaintiffs. In general, this means that the plaintiffs should receive their shares of 75% of the settlement proceeds. If this doesn't happen, MDU has tortiously interfered with the plaintiffs' contract rights with Koch and thereby damaged the plaintiffs. It was wrong for MDU to take any actions in derogation of the plaintiffs' rights to receive these amounts, including but not limited to agreeing to and executing the settlement agreement, including paragraph 4, if it has that effect.

SEVENTH CLAIM
(CIVIL CONSPIRACY)

XXXXVII.

Plaintiffs hereby allege and incorporate by reference the allegations contained in Paragraphs I through XXXXVI, above.

XXXXVIII.

The Defendants conspired among themselves in connection with the August 11, 1993 settlement of the underlying litigation to deny the plaintiffs their rights. Those rights arise from the contracts themselves, Koch's duty to implement the contracts in good faith, and Koch's fiduciary duties and special relationships with the plaintiffs. Koch and MDU exchanged valuable considerations in connection with the settlement. MDU took the lead in determining the amounts allocated to paragraphs 1-3 of the agreement, but Koch and MDU agreed to and executed the entire agreement, including but not limited to paragraphs 1-4. The allocations of the amounts contained in paragraphs 1-3 were arbitrary, and paragraphs 1-4 were wrongly designed and written to impair producers' (including the plaintiffs') claims to share in the settlement amounts paid to Koch, while enabling MDU to recover more of the settlement payment than would otherwise be possible from its customers and ratepayers to the benefit of the private shareholders of MDU. Thus, Koch and MDU conspired and wrongfully agreed to disproportionately and wrongly benefit themselves to the detriment of the plaintiffs and other affected parties. This was either an unlawful act or a lawful act by unlawful means. The damages sustained by the plaintiffs include, but are not limited to, any restrictions that may be imposed on the plaintiffs' rights to share in the settlement payment and any impacts of the settlement on the plaintiffs which are adverse, including but not limited to the contract buyout. WBI itself has calculated the value of the contract buyout alone to be as much as $89 million.

XXXXVIII.

CENEX adopts and pursues the claims asserted herein against Koch only to the extent permitted by the release contained in the settlement agreement dated April 8, 1994 between CENEX and Koch.

NOW, THEREFORE, the plaintiffs request this Court enter an Order:

1. Adjudging that MDU and WBI have been unjustly enriched by their breaches of contract with Koch, allowing plaintiffs to recover damages for all their losses including, but not limited to, the value of their gas determined under the contracts in effect between Koch and MDU/WBI, along with lost revenues attributable to gas production which was curtailed, and prospective profits lost as a result of the conduct by MDU and WBI, and their disbursements.

2. That MDU and BWI account for all deliveries of natural gas by plaintiffs to Koch that was eventually delivered to MDU or WBI, that a judgment be entered against MDU, jointly and severally for all damages to plaintiffs resulting from breaches of the Koch contracts, that a judgment be entered against WBI, jointly and severally for all damages to plaintiffs resulting from breaches of the Koch contracts, and for all damages to plaintiffs resulting from breaches of the Koch contracts from on and after the effective date of an assignment of an interest in the Koch contracts to WBI.

3. That as to all such damages determined by the Court to be due and payable to plaintiffs, a trust be deemed to have been created by operation of law as to the assets of MDU and WBI as necessary to pay these damages to plaintiffs.

4. That any such award of damages to plaintiffs include prejudgment interest as permitted by law.

5. That Koch be determined liable for all damages caused by its breaches of contract and bad faith implementation of contracts and pay the plaintiffs for all actual and consequential damages caused thereby, as well as prejudgment interest.

6. That Koch account for all sales of liquifiable hydrocarbons extracted from plaintiff Exxon's gas and all costs asserted to be associated with their extraction and disposition.

7. With respect to the claims for fraud, conspiracy, and tortious interference in particular, that the defendants pay the plaintiffs actual damages and such other damages permitted by law and prejudgment interest.

8. For such other and further relief, including attorneys fees, costs, and disbursements, as the Court may deem just and proper.

Dated at Dickinson, North Dakota this 17th day of April, 2000.

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DEMAND FOR JURY TRIAL

The plaintiffs do hereby demand trial by jury of nine on all issues as allowed by North Dakota law in the above-captioned action.

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No. 02-263

Supreme Court, U.S.
FILED
SEP 18 2002
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In The

Supreme Court of the United States

BTA OIL PRODUCERS, ET AL.,

Petitioners,

v.

MDU RESOURCES GROUP, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The North Dakota Supreme Court

RESPONDENTS KOCH INDUSTRIES, INC. AND KOCH HYDROCARBON COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Respondents Koch Industries Inc. and Koch Hydrocarbon Company state the following. At all relevant times, Koch Hydrocarbon Company was an unincorporated division of Koch Industries, Inc. Koch Industries, Inc. is a privately held corporation, and there is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. THE PETITION FAILS TO IDENTIFY ANY "IMPORTANT FEDERAL QUESTION" RAISED BY THE NORTH DAKOTA SUPREME COURT'S RULING ON THE UNJUST ENRICHMENT CLAIM BROUGHT AGAINST MDU	3
II. THE PETITIONERS DID NOT RAISE A FEDERAL ISSUE IN A TIMELY MANNER DURING THE STATE COURT PROCEEDINGS	4
III. THE PETITION INVOLVES A CLAIM AGAINST ONLY THE MDU RESPONDENTS AND DOES NOT INVOLVE ANY CLAIM BROUGHT AGAINST THE KOCH RESPONDENTS	6
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308 (1902) 4

Interest of R.O., V.O. and J.H., 631 N.W.2d 159 (N.D. 2001) 5

Koch Hydrocarbon Co. v. MDU Resources Group, Inc., 988 F.2d 1529 (8th Cir. 1993) 2

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291 (1903) 5

State v. Kelly, 631 N.W.2d 167 (N.D. 2001) 5

Webb v. Webb, 451 U.S. 493 (1981) 5

Zucht v. King, 260 U.S. 174 (1922) 3

RULES

Supreme Court Rule 10 3

STATEMENT OF THE CASE

Respondents Koch Industries, Inc. and Koch Hydrocarbon Company (collectively "Koch") owned and operated a gas processing facility in North Dakota from the late 1970's through the late 1990's. That facility was designed to aggregate and process natural gas from fields in western North Dakota and eastern Montana. The facility removed impurities from the gas stream and thereafter separated the gas stream into natural gas liquids and "residue" natural gas suitable for use in domestic and industrial gas burning applications. The gas processed by Koch was purchased from area oil and gas producers pursuant to gas purchase contracts. In general, those contracts provided that the price paid for the gas would be equal to 75% of the proceeds Koch received for selling gas liquids and residue gas from the facility, less certain applicable costs. The Petitioners are gas producers who sold gas to Koch under such contracts. Pet. App. at A-3 to A-4.

From the late 1970's to the late 1980's, Koch sold much of the residue gas from the facility to Respondents MDU Resources Group, Inc. and Williston Basin Interstate Pipeline Company (collectively "MDU") pursuant to two large "take-or-pay" type contracts. A take-or-pay gas purchase contract generally requires that the buyer either take the full amount of gas specified or pay the purchase price for any amount of gas purchased below the specified amount. In 1987, Koch sued MDU in North Dakota federal court for breaches of the two contracts based upon MDU's failure to take or pay for the specified gas quantities. Pet. App. at A-4. The district court ruled that Koch's damages must be calculated based upon the 25% share of the price Koch would have retained had MDU purchased all the gas

specified in the contracts. This ruling by the district court was subsequently affirmed by the Eighth Circuit Court of Appeals. *See Koch Hydrocarbon Co. v. MDU Resources Group, Inc.*, 988 F.2d 1529, 1547 (8th Cir. 1993). Pet. App. at A-4 to A-5. Thereafter, Koch and MDU settled the case. Pet. App. at A-5.

In 1997, the Petitioners sued MDU and Koch in state court in Stark County, North Dakota and alleged purely state-law claims against each. In essence, the Petitioners claimed that they were entitled to damages based upon MDU's breaches of its contracts with Koch. The Petitioners complained that MDU was unjustly enriched by its breaches because MDU had not paid any damages based upon the 75% share of the price, for gas not taken, which would have been attributable to the producers. The Petitioners brought claims of unjust enrichment, implied trust and civil conspiracy against MDU and brought claims of breach of contract, unjust enrichment, fraud, breach of a special relationship duty, tortious interference and civil conspiracy against Koch. Pet. App. at I-4 to I-17. At no time did the Petitioners ever bring any claim against either MDU or Koch under the U.S. Constitution. With one exception not relevant here, the Stark County District Court granted summary judgment to both MDU and Koch. Pet. App. at C-1 to C-17. Again, with one exception not relevant here, the North Dakota Supreme Court affirmed the trial court's grant of summary judgment. Pet. App. at A-1 to A-30.

In a Petition for Rehearing filed after the North Dakota Supreme Court's decision, the Petitioners *for the very first time in the entire five year proceeding* raised the Question Presented under the U.S. Constitution. The full extent of the Petitioners' present federal claim, raised for

the first time on a rehearing petition to the North Dakota Supreme Court, consists of two sentences in a single paragraph of that rehearing petition. Pet. App. at G-2. The Petition for Rehearing was denied. Pet. App. at F-1 to F-2.

REASONS FOR DENYING THE WRIT

I. THE PETITION FAILS TO IDENTIFY ANY "IMPORTANT FEDERAL QUESTION" RAISED BY THE NORTH DAKOTA SUPREME COURT'S RULING ON THE UNJUST ENRICHMENT CLAIM BROUGHT AGAINST MDU.

Supreme Court Rule 10 provides that a "petition for a writ of certiorari will be granted only for compelling reasons" and further requires that in cases involving review of state court decisions that an "important federal question" must be at issue. In a case such as this one, purporting to raise an issue under the U.S. Constitution, it has long been the position of this Court that "it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not ... substantial in character." *Zucht v. King*, 260 U.S. 174, 176 (1922).

The Petition in this case pertains solely to the claim of unjust enrichment made against MDU during the state court proceedings. The claim alleged was plainly one of state common law and was not based upon the U.S. Constitution or federal statutory or common law. The Petitioners' belated federal issue – that the decision applying North Dakota common law of unjust enrichment was unconstitutional – does not raise any "important" federal question. Instead, the Petitioners have teased theoretical federal issues from a plain vanilla state-law

claim. Their tortured effort to connect their state-law unjust enrichment claim to the U.S. Constitution must fail. For over 100 years, this Court has recognized "that not every mere allegation of a Federal question will suffice to give jurisdiction." *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 311 (1902).

Indeed, in this case, the Petitioners fail to identify an important federal question because they could not even decide what constitutional issue they intended to raise before this Court. At turns, the Petitioners complain that the North Dakota Supreme Court's unjust enrichment decision violated the Petitioners' "substantive due process rights" (Pet. at 7), ran afoul of dormant commerce clause principles (Pet. at 11) and deprived the Petitioners of equal protection as a "discriminatory" ruling (Pet. at 12). In any event, the bulk of the Petition is tellingly dedicated to arguing why the North Dakota Supreme Court, in the Petitioners' view, misapplied North Dakota law on unjust enrichment. Pet. at 7-10. In short, the Petitioners have simply taken their failed arguments under North Dakota's common law of unjust enrichment to this Court. There is no viable federal issue, much less any "important" federal issue, raised by the Petition.

II. THE PETITIONERS DID NOT RAISE A FEDERAL ISSUE IN A TIMELY MANNER DURING THE STATE COURT PROCEEDINGS.

Section 1257(a) of Title 28 permits review of a state court decision "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." There is no dispute, and the Petitioners cannot deny, that they failed to raise the federal issue in their Question Presented until they filed a Petition for Rehearing after

the North Dakota Supreme Court had issued its opinion. *See* Pet. at 8 and Pet. App. at G-2. Indeed, even in the Petition for Rehearing, the only reference to any federal issue consists of two sentences in a single paragraph in that petition. Pet. App. at G-2. Once again, Petitioners' conduct violates a principle held by this Court for nearly a century. *See Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903) (federal claim must be set up or claimed at the proper time and in the proper way); *see also Webb v. Webb*, 451 U.S. 493, 496 (1981) (petitioner failed properly to raise claim in state courts).

The Petitioners failed to raise any argument before the trial court in Stark County that a decision adverse to Petitioners on their unjust enrichment claim against MDU would violate the U.S. Constitution. It is well settled under North Dakota law that its Supreme Court will not consider arguments raised for the first time on appeal. *Steele v. Kelly*, 631 N.W.2d 167, 174 (N.D. 2001). Indeed, the North Dakota Supreme Court last year declined to entertain a constitutional argument raised by an appellant for the first time in a reply brief before that court. *Interest of B.O., V.O. and J.H.*, 631 N.W.2d 158, 167 (N.D. 2001). The instant Petition presents an even more egregious failure to raise an issue, as these Petitioners did not raise any claim under the U.S. Constitution until they filed a Petition for Rehearing before the North Dakota Supreme Court. *See McGrew*, 188 U.S. at 311 (federal claim not properly made in petition for rehearing which was denied). Thus, as the parlance of this Court, the federal issue identified in the Petition were neither pressed nor passed upon in the North Dakota state court proceedings.

III. THE PETITION INVOLVES A CLAIM AGAINST ONLY THE MDU RESPONDENTS AND DOES NOT INVOLVE ANY CLAIM BROUGHT AGAINST THE KOCH RESPONDENTS.

The Petition argues that the North Dakota Supreme Court's decision as it relates to the unjust enrichment claim brought against MDU violates the U.S. Constitution. The Petition is defective for the reasons enumerated in Parts I and II. However, if the Court were to overlook these deficiencies and to grant a Writ of Certiorari in this case, the grant should exclude the Koch Respondents. The Petition does not assert that any part of the North Dakota Supreme Court's decision relating to claims that had been brought against Koch violates the U.S. Constitution. Therefore, if a Writ is granted in this case, the Koch Respondents should not be included.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

BTA OIL PRODUCERS, ET AL.,

Petitioners,

v.

MDU RESOURCES GROUP, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The North Dakota Supreme Court

RESPONDENTS MDU RESOURCES GROUP, INC.'S AND WILLISTON BASIN INTERSTATE PIPELINE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED

I. Did the petitioners timely raise a substantial federal question in the state court proceeding to provide the Court with jurisdiction under 28 U.S.C. § 1257?

II. Was the North Dakota Supreme Court's denial of the petitioners' claim of unjust enrichment arbitrary and irrational in violation of substantive due process under the Fourteenth Amendment?

STATEMENT PURSUANT TO RULE 29.6

Respondent MDU Resources Group, Inc. is a publicly traded corporation. Respondent Williston Basin Interstate Pipeline Company is an indirect wholly owned subsidiary of MDU Resources Group, Inc. No publicly held company owns 10% or more of the stock of MDU Resources Group, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
I. Facts	1
II. Proceedings Below	2
REASONS THE WRIT SHOULD BE DENIED	3
I. The Petitioners Failed to Raise a Substantial Federal Question in the State Court Proceeding	3
II. The Petitioners Failed to State a Federal Question	6
A. The petitioners failed to show a property right in a contract or cause of action	8
B. The petitioners failed to show that the state court's denial of the petitioners' claim of unjust enrichment was arbitrary and irrational	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

A&A Metal Buildings v. I-S, Inc., 274 N.W.2d 183 (N.D. 1978) 14

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) 3, 4

Albrecht v. Walter, 572 N.W.2d 809 (N.D. 1997) 14, 15

Apache Corp. v. MDU Resources Group, Inc., 1999 ND 247, 603 N.W.2d 891 ..... *passim*

BTA Oil Producers, et al. v. MDU Resources Group, Inc., 2002 ND 55, 642 N.W.2d 873 ..... 3, 9, 10, 13, 14

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, L.Ed.2d 62 (1988) 4

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, S.Ct. 1940, 95 L.Ed.2d 474 (1987) 4

Buchalter v. People of State of New York, 319 U.S. 427, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943) 11

Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) 7

County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) 6

Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) 6, 7

Exxon Corporation v. Governor of Maryland, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) 7

TABLE OF AUTHORITIES – Continued

Page

Fisher v. Fisher, 546 N.W.2d 354 (N.D. 1996) 5

Herndon v. Georgia, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935) 5

In Re R.O., 2001 ND 137, 631 N.W.2d 159 5

Koch Hydrocarbon Company v. MDU Resources Group, Inc., 988 F.2d 1529 (8th Cir. 1993) 2, 8

Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555 (N.D. 1981).....14

Pentax Corp. v. Robison, 135 F.3d 760 (Fed. Cir. 1998) 5

United States v. Carolene Products, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) 7

Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) 7

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) 4

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) 7

Worcester County Trust Co. v. Riley, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268 (1937) 11

STATUTES

28 U.S.C. § 1257.....3, 11

28 U.S.C. § 1257(a) 3

TABLE OF AUTHORITIES – Continued

Page

RULES

Supreme Court Rules, Rule 14.1(g)(i) 4

Federal Rules of Appellate Procedure, Rule 40 4

North Dakota Rules of Appellate Procedure, Rule 40 5

OTHER SOURCES

Dan B. Dodds, *Law of Remedies*, § 4.9(4) (2d. ed. 1993) 12

STATEMENT OF THE CASE

I. Facts.

The petitioners sold casinghead natural gas to Koch Hydrocarbon Company ("Koch"). Koch processed the raw gas at its plant in North Dakota and sold the processed products. The contracts between the petitioners and Koch did not set a fixed price for the casinghead gas. Instead, Koch paid the petitioners a price based, in part, on a percentage of the proceeds received by Koch from the sale of the processed products. The processed products included residue natural gas that Koch initially sold to Montana-Dakota Utilities Co. which subsequently became a division of MDU Resources Group, Inc. ("MDU").

MDU reduced its purchases of residue gas from Koch in 1983 because of an oversupply of natural gas. In 1985, MDU assigned its gas purchase contracts to its subsidiary Williston Basin Interstate Pipeline Company ("WBI"). Also in 1985, a dispute arose between Koch and WBI over the proper price under their contracts as a result of the deregulation for certain categories of natural gas. After January 1, 1985, WBI paid for the gas it purchased from Koch in accordance with WBI's contract interpretation that deregulated gas was to be priced at a reasonable market price. In 1987, WBI curtailed all its purchases from Koch after the parties were unable to reach agreement on various disputes. The residue gas not purchased by WBI was sold by Koch on the open market and the petitioners were paid for their casinghead gas based on the market prices received by Koch.

Koch sued MDU and WBI in the United States District Court for North Dakota in 1987 for breach of contract. In awarding judgment against MDU and WBI, the district

court reduced Koch's damage claim by 75 percent finding that, for the most part, Koch's contracts with its producers were percentage-of-proceeds contracts with the split averaging 25 percent to Koch and 75 percent to the producers. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's reduction in Koch's damage claim reasoning that Koch should be allowed to collect only the damages it sustained. *Koch Hydrocarbon Company v. MDU Resources Group, Inc.*, 988 F.2d 1529, 1547 (8th Cir. 1993). The case was remanded to the district court for a determination of damages. Koch and WBI then settled.

II. Proceedings Below.

The petitioners, as disappointed third party suppliers, brought an action in North Dakota District Court in 1997 against MDU, WBI and Koch claiming the petitioners were entitled to the additional revenue they would have received if Koch had sold its residue gas to WBI at the prices provided in the contracts between WBI and Koch. [App. C, I] The petitioners alleged state claims against MDU and WBI of unjust enrichment, implied trust and civil conspiracy. [App. I] The petitioners also brought separate unrelated claims against Koch regarding treating fees and revenues from liquid hydrocarbons that were factors into the calculation of the price paid for the casinghead gas under their contracts. [App. C, I] None of the claims asserted against MDU, WBI or Koch alleged a violation of the United States Constitution or a United States statute. [App. I]

The trial court granted summary judgment dismissing the claims against MDU and WBI based on the precedent

regarding similar claims in *Apache Corp. v. MDU Resources Group, Inc.*, 1999 ND 247, 603 N.W.2d 891. The petitioners appealed from the trial court judgment to the North Dakota Supreme Court. The North Dakota Supreme Court affirmed the trial court's dismissal of the petitioners' claims. Contrary to the petitioners' statement, the opinion of the North Dakota Supreme Court is reported. *BTA Oil Producers, et al. v. MDU Resources Group, Inc.*, 2002 ND 55, 642 N.W.2d 873. The petitioners subsequently filed a Petition for Rehearing which alleged, for the first time, in one paragraph, that the state court judgment denied the petitioners equal protection of the law and due process of the law under the Fourteenth Amendment to the United States Constitution. [App. G-2] The North Dakota Supreme Court summarily denied the Petition for Rehearing. [App. F]

REASONS FOR DENYING PETITION

I. The Petitioners Failed to Raise a Substantial Federal Question in the State Court Proceeding.

The petitioners assert the Court has jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the North Dakota Supreme Court. Section 1257(a) allows review of a state court judgment by writ of certiorari where the validity of a state statute is "drawn in question" on a federal ground, or a federal right, privilege, or immunity is "specially set up or claimed." The Court has held that in reviewing a state court judgment under 28 U.S.C. § 1257, it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision. *Adams v.*

Robertson, 520 U.S. 83, 87, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997). Rule 14.1(g)(i), S.Ct.R., requires a petitioner to show that the federal question was timely and properly raised in the state court proceeding. When the highest state court is silent on the federal question presented to the Court for review, the Court assumes the issue was not properly presented. *Id.* The petitioner has the burden of defeating the assumption by demonstrating the state court had a fair opportunity to address the federal question. *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981).

The petitioners concede they first raised their federal question in their Petition for Rehearing to the North Dakota Supreme Court which denied the Petition for Rehearing in summary fashion without addressing the federal question. The Court has generally refused to consider issues raised for the first time in a petition for rehearing when the state court is silent on the issue. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-550, 107 S.Ct. 1940, 1947-1948, 95 L.Ed.2d 474 (1987). The Court's refusal to consider questions first presented in a petition for rehearing is consistent with the petitioners' need to show the issue was raised "'at the time and in the manner required by the state law.'" *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988), (quoting *Webb v. Webb*, *supra* at 501).

Rule 40, N.D.R.App.P., requires that a petition for rehearing of an appeal to the North Dakota Supreme Court "shall state with particularity the points of law or fact which in the opinion of the petitioner the court *has overlooked or misapprehended.*" [Emphasis added] The North Dakota Rule is based on Fed.R.App.P. 40. See,

Explanatory Note, N.D.R.App.P., Rule 40. Although the rule has not been interpreted by the North Dakota Supreme Court, the state court is guided by and gives great deference to any federal case law interpreting the federal counterpart. *Fisher v. Fisher*, 546 N.W.2d 354, 355 (N.D. 1996). Under the federal rule, the United States appellate courts will not address legal theories raised for the first time in a petition for rehearing. *Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) (the theory presented in a petition for rehearing was not overlooked or misapprehended on appeal because it was never presented). Accordingly, raising a federal question for the first time in a petition for rehearing was not sufficient to properly present the question to the North Dakota Supreme Court.

Despite presenting eighteen issues for review [App. H 2-4], the petitioners did not raise a federal question in their appeal of the trial court's judgment to the North Dakota Supreme Court. Even if a federal question had been raised in the appeal to the North Dakota Supreme Court, the issue still would not have been timely raised because it was never presented to the trial court as evidenced by its lack of mention in the trial court's Memorandum Opinion and Order for Judgment. [App. D, C] Issues not raised in the trial court, even constitutional issues, generally will not be addressed on appeal by the North Dakota Supreme Court. *In Re R.O.*, 2001 ND 137, 631 N.W.2d 159.

Nor can the petitioners contend they could not have anticipated either the trial court or North Dakota Supreme Court judgment and therefore they were denied a reasonable opportunity to have the federal question heard and determined in the state court proceeding prior to the petition for rehearing. See, *Herndon v. Georgia*, 295 U.S.

441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935). Both the trial court's ruling and the North Dakota Supreme Court's affirmance were based upon *Apache Corp. v. MDU Resources Group, Inc.*, 99 ND 247, 603 N.W.2d 891, in which the North Dakota Supreme Court affirmed a denial of claims essentially identical to those presented by the petitioners. [App. A-10; D-4] The petitioners, who filed an amicus curiae brief in *Apache*, could not have been surprised that trial court and the North Dakota Supreme Court ruled consistent with the recent precedent of *Apache* particularly when MDU/WBI relied on the *Apache* precedent in seeking summary judgment dismissal of the petitioners' claims. [App. E-4]

II. The Petitioners Failed to State a Federal Question.

The petitioners contend the North Dakota Supreme Court violated the substantive due process requirements of the Fourteenth Amendment by depriving the petitioners of property through denial of "their causes of action and contract rights without a rational basis and in an invidiously discriminatory manner." The constitutional guarantee of substantive due process under the Fourteenth Amendment to the United States Constitution protects an individual against arbitrary and irrational exercises of government power. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998). Although the Court gives heightened scrutiny to alleged substantive due process violations of fundamental rights and liberties, the Court has been hesitant to subject economic legislation to due process scrutiny as a general matter. See *Eastern Enterprises v. Apfel*, 524 U.S. 498,

547, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998); *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772 (1997); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The Court applies a much more deferential review in substantive due process challenges to economic legislation. *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). Government actions adjusting the burdens and benefits of economic life have a presumption of constitutionality and the burden is on the party complaining of a due process violation to establish the action was arbitrary and irrational. *Eastern Enterprises v. Apfel*, *supra* at 524. The challenge fails if the government action is rationally related to a legitimate government purpose. *United States v. Carolene Products*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

The petitioners, in their attempt to fashion a federal question from the North Dakota Supreme Court's application of North Dakota common law principles of unjust enrichment, do not contend there was a violation of one of the fundamental rights and liberties identified by the Court for heightened scrutiny. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). Indeed, the petitioners fail to establish either a property interest entitled to substantive due process protection or arbitrary and irrational governmental action by the North Dakota Supreme Court.

A. The petitioners failed to show a property right in a contract or cause of action.

The petitioners' contention that they were denied their cause of action and contract rights assumes, of course, that the petitioners had contract rights or a cause of action that were denied by the state court. The petitioners acknowledge they had no contracts with MDU or WBI. And unlike the plaintiffs in *Apache Corporation v. MDU Resources Group, Inc.*, 1999 ND 247, 603 N.W.2d 891, who unsuccessfully claimed they were third party beneficiaries to the contracts between WBI and Koch, the petitioners did not assert any contract claims against MDU/WBI. [App. I] Instead, the petitioners' claims against MDU/WBI were limited to equity claims of unjust enrichment and implied trust. [App. I]

MDU/WBI's contracts were with Koch and not with the petitioners. The damages for breach of those contracts were determined by the district court in Koch's action against MDU/WBI and affirmed by the Eighth Circuit Court of Appeals. *Koch Hydrocarbon Company v. MDU Resources Group, Inc.*, 988 F.2d 1529 (8th Cir. 1993). The Eighth Circuit Court affirmed an award of damages against MDU/WBI for breach of the contracts based upon the amount of damages sustained by Koch:

> The District Court found that, for the most part, Koch's contracts with other natural gas suppliers who provided some of the gas that Koch in turn sold to MDU were percentage-of-proceeds contracts. Under these contracts, Koch would process the gas and sell what amounts it could for the best available price, then pay the producer a percentage of the proceeds from those

> sales. Concluding that the split averaged seventy-five percent to the other producer and twenty-five percent to Koch, the court reduced the price damages Koch claimed by seventy-five percent.
>
> In this appeal, Koch argues that the damage award should not have been reduced, since Koch may yet be obligated to reimburse the producers for their seventy-five percent share. We reject this argument. The court did not enforce the contract by ordering specific performance but merely awarded Koch its actual damages. MDU was not ordered to take the gas and pay for it, in which case Koch would be liable to the producers for a percentage of the proceeds. The other producers did not intervene in Koch's suit, and Koch should be allowed to collect only the damages it sustained. If the gas was not sold, Koch did not owe the producers their cut; if Koch did sell to other customers the gas that MDU contracted to buy, Koch presumably paid the producers the appropriate percentage from those proceeds, and the producers would have no further recourse against Koch.

988 F.2d at 1547.

The petitioners had no contract rights either in the contracts or contract prices between WBI and Koch. At best, the petitioners had an expectancy that the natural gas they produced would be processed and the residue gas sold by Koch at the contract prices contained in the contracts between Koch and WBI. See, *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶35, 642 N.W.2d 873, 884. That expectancy, however, did not create a contract right. The petitioners' contracts were with Koch Hydrocarbon. They have not shown or even claimed, with

the exception of an unrelated issue regarding treating fees and liquid hydrocarbons, that they were not paid in the proper manner by Koch under their contracts. If the petitioners wanted a contract right to obtain prices for their gas equal to the contract prices contained in Koch's contracts with WBI, those prices could have been specified in the petitioners' contracts with Koch. Instead, the petitioners negotiated percentage-of-proceeds contracts that entitled them to a price based on the proceeds received by Koch from the actual sale of the gas without regard to whether that gas was sold under contracts with WBI or to another party. As determined by the North Dakota Supreme Court, the petitioners received full performance under the terms of their contracts with Koch. *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶44, 642 N.W.2d 873, 886.

The petitioners' assertion that they were denied a property interest in the form of a cause of action against MDU/WBI is also without merit. The trial court determined, and the North Dakota Supreme Court affirmed, that the petitioners did not have a cause of action against MDU/WBI. *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶27, 642 N.W.2d 873, 882-883. Although petitioners argue they satisfied each of the elements to establish a cause of action for unjust enrichment under North Dakota common law, the North Dakota Supreme Court disagreed and determined that the petitioners, like the plaintiffs in *Apache*, failed to establish the essential element of recovering under a theory of unjust enrichment; i.e., "receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value." *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶21, 642 N.W.2d 873, 881,

quoting Apache Corporation v. MDU Resources Group, Inc., 1999 ND 247, ¶15, 603 N.W.2d 891. The North Dakota Supreme Court declined the petitioners' invitation to overrule the holding in *Apache* that when the alleged impoverishment results from a valid contractual arrangement made by a party, such as the percentage of proceeds contracts between the petitioners and Koch, the result is not contrary to equity and there has been no unjust enrichment. *Id.* at ¶23.

Only if the Court independently reviews and determines contrary to the decision of the North Dakota Supreme Court that the petitioners had a cause of action for unjust enrichment under North Dakota common law, can the petitioners meet the threshold requirement of a property interest entitled to substantive due process protection. This Court, however, does not exercise jurisdiction under 28 U.S.C. § 1257 to review state law questions and the Fourteenth Amendment does not permit a party "to bring to the test of a decision in this court every ruling made . . . in a state court." *Buchalter v. People of State of New York,* 319 U.S. 427, 430, 63 S.Ct. 1129, 1131, 87 L.Ed. 1492 (1943).

The North Dakota Supreme Court is the ultimate authority on issues of North Dakota common law. Pursuant to that authority, the petitioners had no cause of action against MDU/WBI. Even if the petitioners could show that the North Dakota Supreme Court somehow erred in the application of its own common law principles of unjust enrichment, the Fourteenth Amendment does not guarantee that decisions of the state courts are free from error. *Worcester County Trust Co. v. Riley,* 302 U.S. 292, 299, 58 S.Ct. 185, 188, 82 L.Ed. 268 (1937).

B. The petitioners failed to show that the state court's denial of the petitioners' claim of unjust enrichment was arbitrary and irrational.

The petitioners allege the North Dakota Supreme Court's dismissal of their unjust enrichment claim was invidious, arbitrary and capricious because the Court's ruling benefited the primary utility in North Dakota at the expense of gas producers who were neither incorporated nor had their principal place of business in North Dakota. The petitioners cite cases in support of their position that the Court has struck down as unconstitutional disparities in treatment of in-state and out-of-state interests. The cited cases, however, involve alleged violations of the dormant Interstate Commerce Clause and not alleged violations of substantive due process.

The petitioners are unable to meet their burden of showing that the North Dakota common law principles of unjust enrichment, or their application by the North Dakota Supreme Court, were arbitrary and irrational. The North Dakota Supreme Court relied upon its prior opinion in *Apache Corp. v. MDU Resources Group, Inc.*, *supra*, which held that where the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity. 1999 N.D. 247 at ¶15. In support of its opinion in *Apache*, the state court quoted an explanation from Dan B. Dodds, *Law of Remedies*, § 4.9(4), page 482 (2d Ed. 1993) regarding the applicability of restitution in three-way commercial transactions. Dodds explained that in transactions involving three parties where the parties could have contracted each with both others but did not do so, the separate contracts convey the limited kinds of liability and exposure each party intends. The

state court quoted Dodds that "[r]espect for that contract arrangement requires the courts to refuse restitution between the parties who did not contract with each other." *Apache Corp. v. MDU Resources Group, Inc.*, 1999 ND 247, ¶14, 603 N.W.2d 891 (quoting Dan B. Dodds, *Law of Remedies*, § 4.9(4) at 482).

Therefore, the North Dakota Supreme Court's denial of the petitioners' unjust enrichment claim was not only consistent with its prior application of unjust enrichment principles, but also consistent with restitution principles recognized by other authorities. In contrast, as noted by the North Dakota Supreme Court, the petitioners have never cited a single decision from any jurisdiction allowing third party suppliers such as the petitioners to recover for unjust enrichment under facts similar to those presented in this case. *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶23, 642 N.W.2d 873, 882.

The petitioners provide no support for their assertion that the North Dakota Supreme Court's ruling was based upon the residency of the parties. On their face, the unjust enrichment principles relied upon by the state court apply regardless of the residency of the parties. The principles, on their face, are neither arbitrary nor irrational. Nor is there anything in the North Dakota Supreme Court's opinion that suggests its application of the common law principles was influenced by the residency of the parties. Although Montana-Dakota Utilities Co. is a primary natural gas distributor in North Dakota, it also distributes natural gas in other states. WBI is an interstate pipeline company operating under the jurisdiction of the Federal Energy Regulatory Commission. It provides service in states other than North Dakota. Ironically, it was the petitioners who championed that they represented "oil and

gas producers and agricultural interests, which are among the cornerstones of [North Dakota's] economy." [App. H-16] The petitioners argued that if the North Dakota Supreme Court affirmed the trial court judgment, "purchasers of processed or manufactured products will reap windfalls at the expense of local producers." [App. H-18] The North Dakota Supreme Court, however, applied the principles of unjust enrichment consistent with the facts and North Dakota common law without regard to the geographic interests of the parties.

The petitioners argue the North Dakota Supreme Court "dramatically diverged" from the language of the state court's traditional five element test of unjust enrichment in order to deny the petitioners their cause of action and contract rights. The North Dakota Supreme Court's holding in this proceeding, and in *Apache,* that a party asserting a claim for unjust enrichment must establish that the claimed enrichment must be a "benefit at the direct expense" of the complainant has been consistently recognized by the state court. See *A&A Metal Buildings v. I-S, Inc.*, 274 N.W.2d 183 (N.D. 1978); *Midland Diesel Service & Engine Co. v. Sivertson*, 307 N.W.2d 555 (N.D. 1981). The parties in both of the above cited cases appear to have been North Dakota parties. Similarly, the North Dakota Supreme Court cited *Albrecht v. Walter*, 572 N.W.2d 809 (N.D. 1997) for the proposition that "[w]hen the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity". *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶ 23, 642 N.W.2d 873, 882. This proposition is an adjunct of the fourth of the North Dakota Supreme Court's frequently stated elements of unjust enrichment that there must be an absence of a justification for the

enrichment and the impoverishment. *Apache Corp. v. MDU Resources Group, Inc.*, 99 ND 247, ¶13, 603 N.W.2d 891, 894. In *Albrecht v. Walter*, *supra*, the North Dakota Supreme Court determined that a payment contribution from the defendant to the plaintiffs would not constitute unjust enrichment because the contribution was consistent with a valid contractual arrangement made by the defendant. The parties were North Dakota residents.

The North Dakota Supreme Court consistently applied North Dakota principles of unjust enrichment in affirming the dismissal of the petitioners' claims against MDU and WBI without regard to the residency of the parties. Those principles are rationally related to the state's interest in defining when the courts of North Dakota will provide equitable relief to parties. The North Dakota Supreme Court rationally determined that it will not provide an equitable remedy of unjust enrichment when the party's alleged impoverishment results from a contract arrangement made by the party.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(4)

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In the

SUPREME COURT OF THE UNITED STATES

BTA OIL PRODUCERS, ET AL.,
Petitioners,

v.

MDU RESOURCES GROUP, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH DAKOTA SUPREME COURT

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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17pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

REASONS FOR GRANTING THE WRIT.....1

I. The Petitioners Properly Raised Important Federal Questions in the State Court Proceedings Below.....1

II. State Court Action Denied Petitioners Their Causes of Action and Contract Rights.....6

III. The State's Denial of Petitioner's Causes of Action and Contract Rights Was Arbitrary, Capricious, and Invidious.....6

IV. Denial of Petitioners' Causes of Action and Contract Rights Was Impermissibly Protectionist and Improperly Discriminates in Favor of North Dakota's Utility Against Gas Producers Who Reside in Other States.....9

V. The Petition Indirectly Involves a Claim Against Koch.....11

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases **Page**

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988).....2

Hathorn v. Lovern, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982).....3

Illinois v. Gates et Ux., 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).....2

Immigration and Naturalization Service v. Doherty, 112 S.Ct. 719, 116 L.Ed.2d 823 (1992).....4

Koch v. MDU, 988 F.2d 1534.....6

Mallett v. North Carolina, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed.1015 (1901).....4

Three Affiliated Tribes v. Wold Engrg., 476 U.S. 871, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986).....5

U.S. Parole Comm. V. Geraghty, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980).....4

Williams v. U.S., 122 S.Ct. 1221, 152 L.Ed.2d 153 (2002).....4

Woods v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).....5

TABLE OF AUTHORITIES (Continued)

Cases **Page**

Yee v. City of Escondido, 112 S.Ct. 1522, 118 L.Ed.2d 153.....5

A & A Metal Bldgs. v. I-S, Inc., 274 N.W.2d 183 (N.D. 1978).....9

Apache Corp. v. MDU Resources Group, Inc., 603 N.W.2d 891 (1999).....9

State of North Dakota v. Lang, 463 N.W.2d 648 (N.D. 1990).....3

State of North Dakota v. Martin, 636 N.W.2d 447 (N.D. 2001).....3

State of North Dakota v. Mertz, 514 N.W.2d 662 (N.D. 1994).....3

MISCELLANEOUS

C.J.S. Contracts, 17 Section 6.....5

Dan D. Dobbs, Law of Remedies, Section 4.9 (4), page 482 (2d. ed. 1993).....7

Two groups of Respondents—MDU Resources Group, Inc. and Williston Basin Interstate Pipeline Company (collectively "MDU") and Koch Industries, Inc. and Koch Hydrocarbon Company (collectively "Koch") each submitted Briefs in Opposition to the Petition for Writ of Certiorari. The Petitioners hereby submit their Reply Brief. For the reasons stated below, MDU's and Koch's Oppositions are unmeritorious, and the Petition for Writ of Certiorari should be granted.

1. THE PETITIONERS PROPERLY RAISED IMPORTANT FEDERAL QUESTIONS IN THE STATE COURT PROCEEDINGS BELOW.

Both MDU and Koch allege that the Petitioners did not timely raise federal issues in the state court proceedings. This is incorrect.

In their Petition for Rehearing, the Petitioners expressly asserted that the North Dakota state court determination that they had no causes of action for unjust enrichment and implied trust deprived them of equal protection and due process of law, as afforded by Section 1 of the Fourteenth Amendment of the U.S. Constitution, because it irrationally enables MDU to retain many millions of dollars of damages resulting from its breaches of contract contrary to well-established principles of restitution, to the benefit of the primary utility in North Dakota, and to the detriment of gas producers which are neither incorporated in nor have their principal places of business there. Appendix G-2. Therefore, in the underlying state court proceedings, the Petitioners raised important federal questions concerning the Constitution of the United States. The significance of

those questions is greatly enhanced here, because literally hundreds of millions of dollars hang in the balance. In an Order dated May 17, 2002, the North Dakota Supreme Court stated that "having considered the matter" it "denied" the Petition, notwithstanding a partial dissent from one of the five justices. Appendix F-1 and 2.

In *Illinois v. Gates et Ux.*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), this Court clarified that it could appropriately entertain federal issues which were either "presented or decided in the highest court of the state whose judicial action we are called upon to review." 462 U.S. 219. (emphasis added.) As explained above, the Petitioners undeniably "presented" federal issues in their Petition for Rehearing, which is alone sufficient to justify review under *Gates*. *See also Bankers Life & Casualty Co. v.* Crenshaw, 486 U.S. 71, 77-78, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988).

MDU and Koch assert, however, that even if the Petitioners have raised a federal issue, they failed to do so on a timely basis under North Dakota state law, so this Court should not entertain their Petition for Writ of Certiorari. However, in its Opposition MDU acknowledges that N.D.R.App.P. 40 entitles the Petitioners to have asserted on rehearing any point of law that the North Dakota Supreme Court previously "overlooked," and it acknowledges that there is not a single North Dakota authority for the proposition that the Petitioners untimely raised their constitutional arguments on rehearing pursuant to that rule. MDU Opposition at 4-5. Because Petitioners timely presented their contentions in accordance with Rule 40, MDU's and Koch's arguments that the contentions were late fails.

MDU and Koch also contend that Petitioners did not timely make their assertions, because they were not presented at the trial court level. However, N.D.R.App.P. 40 is controlling, so compliance with it is sufficient. Further, there is no statute or court rule in North Dakota which prohibits an appellate court from entertaining contentions which were not made at the trial court level. *See Hathorn v. Lovern*, 457 U.S. 255, 264, 102 S.Ct. 2421, 72 L.Ed2d 824 (1982).

Moreover, this Court stated in *Hathorn* that even if such a procedural rule existed, a petitioners' failure to comply with "a state procedural ground is not adequate (to deny review) unless the procedural rule is 'strictly or regularly followed.'" 457 U.S. 263. As MDU acknowledges in its Opposition, the strongest statement that can be made about North Dakota law is that, "Issues not raised in the trial court, even constitutional issues, generally will not be addressed on appeal by the North Dakota Supreme Court." MDU Opposition at 5 (emphasis added.) Thus, the North Dakota rule of preclusion is not "strictly or regularly followed," as required by *Hathorn*.

To the contrary, in fact, the North Dakota Supreme Court has expressly recognized exceptions to the general rule of preclusion, such as where there has been an "obvious error" below. *See, e.g., State of North Dakota v. Martin*, 636 N.W.2d 447 (N.D. 2001) and *State of North Dakota v. Lang*, 463 N.W.2d 648 (N.D. 1990). It has also openly acknowledged that despite its general rule, it has the authority to address issues not raised in the trial court, but that it will exercise such authority "cautiously, " such as where a party "has suffered serious injustice." *State of North Dakota v. Mertz*, 514 N.W.2d 662 (N.D. 1994). Moreover, both

the "obvious error" and the "serious injustice" exceptions apply here.

Furthermore, in this very case, the North Dakota Supreme Court's order on rehearing expressly states that it "considered" and "denied" the contentions which were made. Thus, the rehearing order establishes not only that there is no "strict" and "regular" rule of preclusion under North Dakota law, but that none was followed here.[1]

Moreover, as discussed above, even if a petitioner did not timely raise an issue, it is sufficient to justify review if the state court decided it. *Mallett v. North* Carolina, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015 (1901). Here, the North Dakota Supreme Court expressly stated in its order that it had both "considered" the issues raised in the Petition for Rehearing, and that it decided those contentions by "denying" them. Therefore, both alternative grounds for review under *Gates* and *Crenshaw* are satisfied.

A court has "decided" a matter when it explicitly states that it has "considered" it and "denied" it. *Williams v. U.S.*, 122 S.Ct. 1221, 152 L.Ed.2d 153 (2002), *Immigration and Naturalization Service v. Doherty*, 112 S.Ct. 719, 116 L.Ed.2d 823 (1992), *U.S. Parole Comm. v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). Because there is no blanket prohibition in North Dakota upon an appellate court entertaining contentions that were not made below, since there are well-recognized exceptions, and

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[1] The rehearing order in this case significantly did not state that the North Dakota Supreme Court was dismissing Petitioners' contentions because they had not been made at the trial court level, but it states that it had "considered" the contentions made and was "denying" them.

because the North Dakota Supreme Court affirmatively stated that it had considered the Petition for Rehearing and had denied it, this is not a case in which this Court should determine that a state supreme court has denied discretionary review. *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 118 L.Ed.2d 153.

Alternatively, under *Yee*, this Court is entitled to consider this Petition even assuming arguendo that if the Petitioners are making claims that were neither raised nor addressed below, because "extraordinary circumstances" exist here. 503 U.S. 533. Moreover, this Court has entertained contentions on writ of certiorari review even if they were neither presented nor decided in the state court—in at least one case on review of another decision by the North Dakota Supreme Court. *Woods v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), and *Three Affiliated Tribes v. Wold Engrg.*, 476 U.S. 871, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986). For all these reasons, Petitioners' contentions were adequately presented and decided below to justify review by this Court.

2. STATE COURT ACTION DENIED PETITIONERS THEIR CAUSES OF ACTION AND CONTRACT RIGHTS.

MDU also argues that the Petition for Writ of Certiorari should be denied, because the Petitioners had no causes of action or contract rights that have been denied by state action. This argument is circular, unduly semantic, and demonstrably premature. The Petitioners did not bring their claims against MDU based on direct contracts. Rather, Petitioners sued MDU for unjust enrichment and implied trust, which are a form of implied or quasi-contract. 17 C.J.S. Contracts, Section 6. The North Dakota Supreme Court

decided that Petitioners do not have any causes of action against MDU, which effectively means that they do not have an enforceable implied or quasi-contract. Appendix A-11 to 13. The issue before this Court is whether this state court determination is violative of the U.S. Constitution. Therefore, MDU's argument that the Petitioners have no causes of action or contract rights erroneously puts the cart before the horse, is circular, and is certainly premature, because it incorrectly assumes that the state court determination under review will be upheld.

3. THE STATE'S DENIAL OF PETITIONER'S CAUSES OF ACTION AND CONTRACT RIGHTS WAS ARBITRARY, CAPRICIOUS, AND INVIDIOUS.

MDU additionally asserts that it was not arbitrary and capricious for the North Dakota Supreme Court to have denied Petitioners their causes of action and contract rights. Koch significantly does not even make this argument. MDU's claim is erroneous.

To briefly recapitulate, Petitioners had contracts to sell their gas to Koch, which had contracts to resell the processed or residue gas to MDU. Koch has mischaracterized its contracts with MDU as "take-or-pay" contracts under which MDU would have had the option of purchasing the contract quantity of gas or alternatively refusing deliveries and paying for it. Koch Opposition at 1. Instead, the primary "McKenzie Contract" contained "take-and-pay" provisions which obligated MDU to purchase the contract quantities of gas from Koch. *Koch v. MDU*, 988 F.2d 1534. Thus, MDU was contractually obligated to purchase the gas that Petitioners had contracted to sell to Koch, or alternatively at least to pay for it.

Both the trial court and the Eighth Circuit determined in *Koch v. MDU* that MDU breached its contracts with Koch by failing to honor these obligations. 988 F.2d 1533, 1535, and 1537. If MDU had fulfilled its contractual obligations to Koch, it would have paid Koch for Petitioners' gas, and they would have received many millions of dollars more under their percentage of proceeds and similar contracts with Koch. Accordingly, MDU affirmatively represented in *Koch v. MDU* that the gas producers bore 75% of the resulting losses under their percentage of proceeds and similar contracts with Koch, and MDU's liability was decreased by 75% as a result. Appendix H-10.

The Petitioners assert that it was arbitrary, capricious, and invidious for the North Dakota Supreme Court to have decided that the Petitioners had no available causes of action to recover their losses from MDU under legal theories such as unjust enrichment. MDU acknowledges that the purpose of unjust enrichment is restitution, but in order to urge affirmance, it attempts to rely on a section from Dan B. Dobbs, *Law of Remedies*, section 4.9(4), page 482 (2d ed. 1993) regarding three-party transactions. MDU Opposition at 12-13. However, as Petitioners established in their appellate brief before the North Dakota Supreme Court, Dobbs' first "core idea" of restitution is "Defendant's gains, not Plaintiff's losses," which means that the defendant should be required to disgorge its ill-gotten gains, even if the plaintiff does not assert that he has been injured. Appendix H-12 to

13.[2] Thus, the decision under review fails to pass muster even under Dobbs' first "core idea."

Further, the Petitioners went on to provide six separate reasons why Dobbs' discussion of three-party transactions does not bar Petitioners' claims, including but not limited to the following: (1) that it only applies where the parties could have contracted with each other but didn't do so, and it was not established on summary judgment that this was the case here; (2) it is from a section of Dobbs concerning "improvements by subcontractors," which is a materially different situation; and (3) it applies only where the parties voluntarily agree to limit their remedies by contract, which did not occur here. Appendix H-13 to 19.

An action is arbitrary and capricious if it is undertaken for reasons unrelated to its proper purpose. The purpose of unjust enrichment is restitution, and it is squarely inconsistent with restitution for the North Dakota Supreme Court to deny Petitioners' causes of action and thereby enable MDU to retain many millions of dollars of damages attributable to its judicially determined breaches of contract. This is especially true because MDU successfully represented to the trial court and the Eighth Circuit in *Koch v. MDU* that gas producers such as the Petitioners were the ones who had sustained the economic losses and had its liability to Koch reduced 75% as a result. This would in fact be the essence of unjust enrichment. Clearly, no legitimate restitutionary purpose is served by the North Dakota Supreme Court's decision in this case.

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[2] Petitioners apologize to the Court for some unintended errors in printing the Petition for Writ of Certiorari and its attachments. For example, the printers failed to make appropriate paragraph breaks and to separately set forth the headings contained in Petitioners' appellate brief.

4. DENIAL OF PETITIONERS' CAUSES OF ACTION AND CONTRACT RIGHTS WAS IMPERMISSIBLY PROTECTIONIST AND IMPROPERLY DISCRIMINATES IN FAVOR OF NORTH DAKOTA'S UTILITY AGAINST GAS PRODUCERS WHO RESIDE IN OTHER STATES.

MDU does not deny that it retains 75% of the damages attributable to breaches of contract that it has been found to have committed. MDU also does not dispute that it is the primary utility in North Dakota, although it asserts that it additionally provides some services in other states. MDU also does not deny that if MDU were to pay Petitioners their share of the $400 million of unrecovered breach of contract damages, it would seek to recover those costs from ratepayers in a relatively-sparcely populated state of North Dakota. MDU additionally does not dispute that Petitioners are neither incorporated in North Dakota nor have their principal places of business there.[3]

MDU asserts that the denial of Petitioners' causes of action is not the result of in-state protectionism but simply resulted from a fair and consistent application of state law. Petitioners addressed the state law issues in their Petition for Writ of Certiorari and will not repeat that here.[4] However, notwithstanding MDU's

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[3] The same is true of Apache Corporation and Snyder Oil Company, which were the plaintiff gas producers in *Apache Corp. v, MDU Resources Group, Inc.*, 603 N.W.2d 891 (1999).

[4] The Petitioners will, however, briefly address three fundamental errors in MDU's analysis. First, MDU asserts that the Petitioners were damaged by their percentage of proceeds contracts instead of by MDU's breaches of its contracts with Koch. This is erroneous, as Petitioners explained at page 10 of their Petition for Writ of

argument, there is no way that the state court's denial of Petitioners' causes of action can fairly and reasonably be understood as a correct application of restitution, which focuses on the disgorgement of ill-gotten gains.

Moreover, as the Petitioner's established in their Petition for Writ of Certiorari, a law can violate due process even if it does not expressly classify persons in a discriminatory manner. Rather, the courts should look at the law's practical effect in evaluating whether it

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Certiorari. Second, MDU also erroneously asserts at page 14 of its Opposition that *A&A Metal Bldgs. V. I-S, Inc.*, 274 N.W.2d 183 (N.D. 1978), holds that under North Dakota law, the defendant must receive "a benefit at the direct expense" of the plaintiff in order for the plaintiff to assert an unjust enrichment claim. Although the North Dakota Supreme Court noted at 274 N.W.2d 189 that the trial court had made such a finding, it instead characterized the governing standard as, "When a person has been unjustly enriched at the expense of another, he must make restitution to the other." 274 N.W.2d 189. This is the correct standard, and it supports Petitioners' claims in this case. Finally, like the North Dakota Supreme Court did in *Apache Corp. v.MDU Resources Group, Inc.*, 603 N.W.2d 891 (1999), MDU distorts the governing five element test for unjust enrichment in order to disallow Petitioners' and Apache's claims. As Petitioners explained at page 8 of the Petition for Writ of Certiorari, the third element is "A connection between the enrichment and the impoverishment," and the fourth element is "Absence of a justification for the enrichment and the impoverishment." Petitioners correctly satisfy these two separate elements separately. However, MDU asserts that there two separate elements should be combined for the first time and distorted in order to justify denying Petitioners' and Apache's causes of action. ("a party asserting a claim for unjust enrichment must establish that the claimed enrichment must be a 'benefit at the direct expense' of the complainant....") MDU Opposition at 14. Petitioners have addressed the three authorities that MDU incorrectly relies upon in support of this new requirement in this footnote and at pages 8-9 of the Petition for Writ of Certiorari. They simply do not support the determination under review.

is discriminatory, and a discriminatory effect is improper. Petition for Writ of Certiorari at 11. Using this practical approach, the state court action can only be understood as impermissibly discriminating in favor of the North Dakota state utility and against gas producers which reside out of state.

5. THE PETITION INDIRECTLY INVOLVES A CLAIM AGAINST KOCH.

Finally, Koch asserts that the Petition for Writ of Certiorari does not involve any claims against it, so if a writ is granted, it should not include Koch. This assertion is in error. One of Petitioners' claims is that Koch committed in writing to keep them apprised of "major developments" in *Koch v. MDU*, and that Koch failed to do so, so they did not intervene or take other actions to protect their rights. The North Dakota Supreme Court affirmed the trial court's grant of summary judgment on this claim expressly on the ground that even if Koch had honored its commitment to keep the Petitioners apprised of "major developments," there were no actions that they could have taken to protect their interests, because they didn't have any causes of action that they could have asserted against MDU. Appendix A-13. Therefore, if this Court determines that the North Dakota Supreme Court improperly denied Petitioners' their causes of action against MDU, it necessarily follows that the Petitioners are entitled to pursue their claims against Koch for dishonoring its written commitment concerning major developments.

The Petitioners anticipate that MDU would be primarily liable. However, Koch could also secondarily be liable, for example, if some portion of Petitioners'

claims against MDU were determined to be barred, such as by the statute of limitations.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and herein, the Petitioners respectfully submit that it should be granted.

Respectfully submitted,

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